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E. J. Kane

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FAN

KE







AMERICAN NEGLIGENCE CASES

[CITED AM. NEG. CAS.]

**A COMPLETE COLLECTION OF ALL REPORTED NEGLIGENCE CASES
DECIDED IN THE UNITED STATES SUPREME COURT, THE UNITED
STATES CIRCUIT COURTS OF APPEALS, ALL THE UNITED
STATES CIRCUIT AND DISTRICT COURTS, AND THE
COURTS OF LAST RESORT OF ALL THE STATES
AND TERRITORIES, FROM THE EARLIEST
TIMES, WITH SELECTIONS FROM
THE INTERMEDIATE COURTS.**

**TOPICALLY ARRANGED
WITH
NOTES OF ENGLISH CASES AND ANNOTATIONS**

**PREPARED AND EDITED BY
T. F. HAMILTON
OF THE NEW YORK BAR**

VOL. IX

**NEW YORK
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1899**

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PREFACE.

This volume (9 AMERICAN NEGLIGENCE CASES) contains the cases relating to the LIABILITY OF CARRIERS OF PERSONS for ACCIDENTS ON TRAINS, STREET CARS, STEAMBOATS, STAGE COACHES, ETC., and at STATIONS, DEPOTS, LANDINGS, FERRY HOUSES, ETC., classified under the divisions of DERAILMENT OF TRAINS, ETC.; RIDING ON PLATFORMS OF CARS; SICK PASSENGERS; TRESPASSERS, ETC.; DEFECTIVE STATION PLATFORMS; ICY PLATFORMS; FALLING OBJECTS; STRUCK BY MISSILES and PROTRUDING OBJECTS; COLLISIONS; EXPLOSIONS; DANGEROUS POSITION ON CARS, ETC.; RIDING ON FREE PASSES; PERSONS NOT PASSENGERS, ETC.

The cases comprised herein cover all actions from the earliest period to 1896 decided in the highest Courts of Alabama, Arizona, Arkansas, California, Colorado (Supreme and Appellate), Connecticut, Dakota, Delaware, District of Columbia (Supreme and Appellate), Florida, Georgia, Idaho, Illinois (Supreme and Appellate), Indiana (Supreme and Appellate), Iowa, Kansas (Supreme and Appellate), Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri (Supreme and Appellate), Montana, Nebraska, Nevada, New Hampshire, New Jersey (Supreme and Errors and Appeals), New Mexico and New York (Court of Appeals, Appellate Division, Supreme and intermediate courts); together with annotations and notes of English cases.

In the next volume the cases in the remainder of the States and the Federal Courts, covering the same topics and period, will be published, thus completing the important topic of NEGLIGENCE OF CARRIERS OF PERSONS.

It will be seen that more than five hundred cases are reported in this volume, either verbatim, or in abstract, or in the form of notes, the latter plan enabling the series to be completed within reasonable compass. The index gives a complete list of the notes of cases grouped under the various divisions of the topics in this volume, an arrangement which, it is hoped, will prove a convenience to the practitioner in the preparation of briefs upon any of the topics treated herein.

A reference to the Table of Cases Classified, which precedes the Index, will enable the reader to see, at a glance, the causes of action and the injuries sustained in the cases reported in this volume.

The Editor desires to cordially acknowledge the able services of MR. WALTER J. EAGLE in the preparation of the cases and notes thereto, and the compilation of the Tables, etc., in this volume of AMERICAN NEGLIGENCE CASES.

T. F. HAMILTON.

New York, November, 1899.

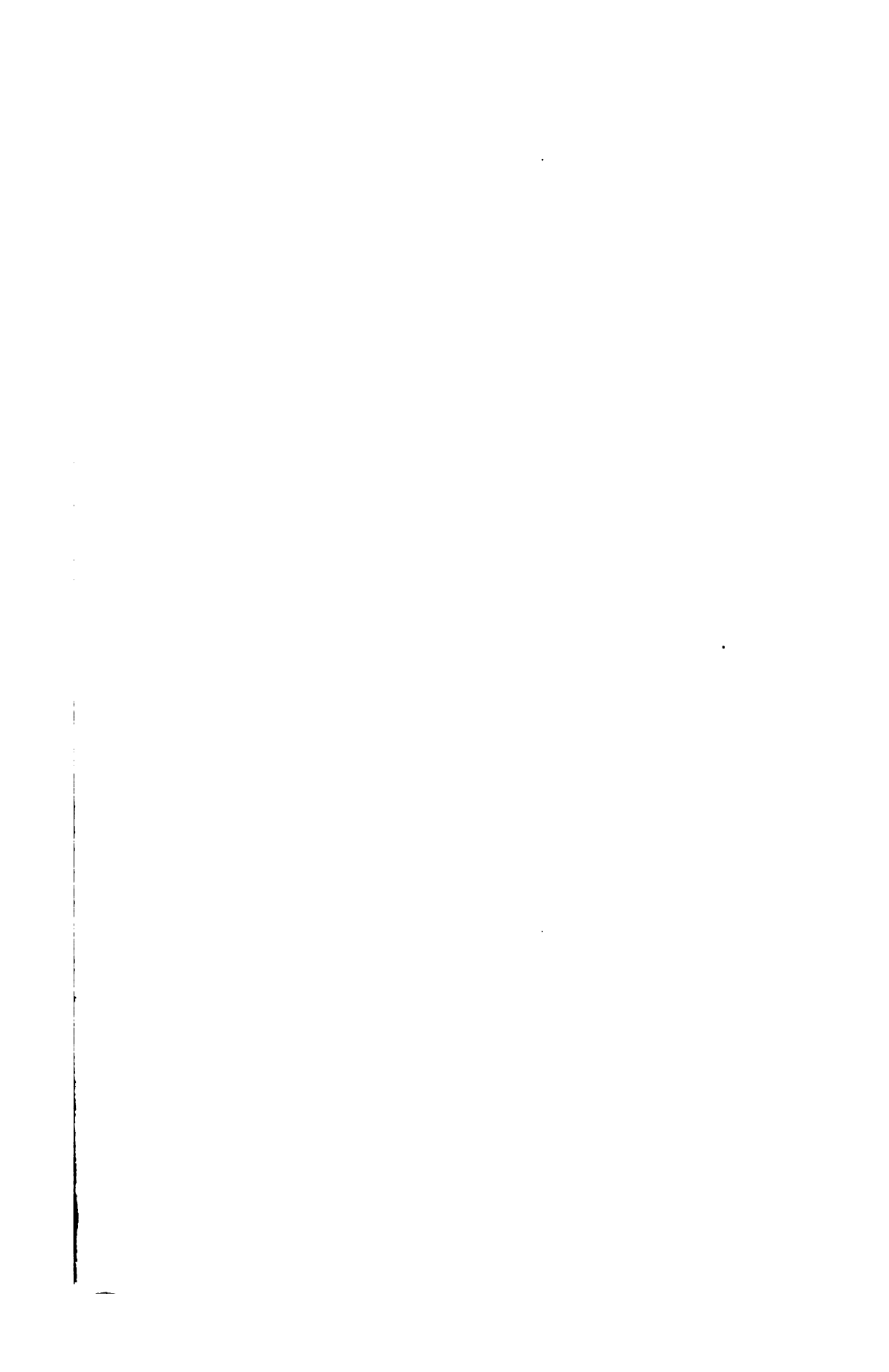


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AMERICAN NEGLIGENCE CASES.

CARRIER OF PERSONS.

THOMPSON v. DUNCAN.

Supreme Court, Alabama, December Term, 1884.

[Reported in 76 Ala. 334.]

ENTERING CABOOSE BEFORE COUPLED TO TRAIN—PASSENGER INJURED BY BACKING OF TRAIN—CONTRIBUTORY NEGLIGENCE.—Where plaintiff entered the caboose car of a train while it was standing on the track before it was coupled to the train, taking a position near the door, and while the same was being coupled was injured by the train backing with violence against the caboose, the question of contributory negligence was properly submitted to the jury.

DANGEROUS POSITION ON CAR—INSTRUCTION.—An instruction that it was negligence on the part of the railway company not to warn passengers of the danger of a shock from coupling cars was rightly refused, as persons of ordinary prudence, entering a caboose and standing near the door, would be apt to be aware of danger, if any, in such a position.

CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—A charge that if plaintiff's negligence "contributed in any way to the happening of the injury," is misleading, as to come within the rule, plaintiff's negligence must contribute proximately to the injury inflicted.

APPEAL, from the Circuit Court of Mobile. *Reversed.*

"Action by Joseph W. Thompson, against William B. Duncan, receiver and trustee of the Mobile and Ohio Railroad, who was operating said road under the appointment of the United States Circuit Court at Mobile, to recover damages for personal injuries sustained by plaintiff, by being thrown violently to the ground, from and through the open door of a 'caboose car,' in which he was a passenger from Mobile to Whistler, a station about five miles distant from the city. The defendant pleaded the general issue, and a special

plea averring contributory negligence on the part of the plaintiff; and the cause was tried on issue joined on these pleas.

"It appeared that the 'caboose car' was part of a freight train, which carried passengers at the usual rates, and which left Mobile at 12 o'clock *m.*, daily. The plaintiff was in the habit of travelling on the train, and he entered the car while it was standing on the track, several minutes before it was coupled to the train. As to the circumstances attending the accident, the plaintiff thus testified as a witness in his own behalf: 'I got on the caboose car before the same had been attached to the main train. I knew that the train had to back down, and couple the caboose to it before it started. When I entered the caboose, the only vacant seat I observed was something that looked like the half of a cot, that was standing against the side of the car, and the end of which was about six inches from the floor. I took my seat upon this cot, which placed me about two feet from the door of the car. While sitting in this position, the main part of the train backed down, a brakeman called for a long link, and some one handed him one, and I thought the coupling had been made; but, shortly afterwards, the main part of the train backed down against the caboose, with such force and violence that I lost my balance, and slid along the side of the car until I came to the door. The force was such that I struck my shoulder and hip against the further side of the door-facing as I fell out, and thence to the ground; and nothing to catch hold of, I fell out on my neck and shoulders, which hurt me seriously. Some one assisted me up on my feet, but I got back in the car without assistance, took the same position I occupied before, and went on to Whistler.'

"It was shown that the train consisted of about twenty cars; that the 'caboose' was about forty feet long, but only the central part was used for the accommodation of passengers, the two ends being used as a cook-room and conductor's room; that the central part was only about fifteen feet in length, and there was on each side a door about six feet wide; that several boxes, in which tools were kept, were used as seats for the passengers, and there were several chairs. Some of the witnesses testified that the seats were all occupied when the plaintiff entered the car, but others said that several seats were then vacant. As to the severity of the shock, the witnesses differed in their testimony; some describing it as unusually severe, while others said that it was not more violent than usual in coupling a long train of cars. The brakeman who coupled the 'caboose' with the other cars, testifying as a witness for the defendant, said that the coupling was effected by him without difficulty

or danger, and that the shock was not any greater than usual; though the plaintiff's testimony showed that two other persons, besides himself, were thrown from their seats.

"The above being the substance of the evidence, the plaintiff asked the following charges, which were in writing, and which the court refused to give: 1. 'If the jury believe, from the evidence, that the plaintiff was a passenger on the railroad car of the defendant when the injury occurred, and that he was injured by an accident occurring while such passenger; and if they further find that such accident could have been avoided by the use of very great care and diligence by those in charge of the movement of the cars, then the defendant would be liable.' 2. 'If the plaintiff was injured while a passenger on the defendant's railroad cars, by the negligence and want of care of the employees of the defendant having control of the cars, the defendant would be liable, although the jury may be satisfied that the negligence was not gross, but slight in its character.' 3. 'If the jury should find from the evidence that, from the number of passengers on board of the car, and from the lack of seating accommodation, plaintiff was obliged to stand up in the car; and if they further find from the evidence, that the shock which would necessarily result from bringing the other cars against the caboose, for the purpose of coupling it, would be so great as to throw down a passenger who was standing, if such shock should come without warning; then it would be the duty of the officers of the train, having knowledge of these facts, to warn the passengers before giving such shock; and if, under such circumstances, no warning was given, and the plaintiff was not otherwise made aware of the coming of such shock, and was in fact taken unawares, then the defendant would be guilty of negligence in not giving notice or warning.'

"The plaintiff duly excepted to the refusal of each of these charges, and also to several charges given by the court at the instance of the defendant, among which were the following: 6. 'Even if the jury should be satisfied, from the evidence, that there was misconduct or negligence on the part of the defendant, his agents or employees, and that the plaintiff sustained injury in consequence of it; still, if the jury should also be satisfied, from the evidence, that there was any want of ordinary care on the part of the plaintiff, and such lack of ordinary care contributed in any way towards the happening of the injury, then the jury must find for the defendant, unless the evidence shows to their satisfaction that the injury was wantonly or intentionally caused by the defendant.' 9. 'Before the plaintiff can be entitled to recover in this case, the jury must be satisfied from

the evidence, 1, that the defendant, his servants or agents have been guilty of fault or negligence, 2, that the plaintiff has been thereby injured, and 3, that this damage has been without the lack of any reasonable care on his part; unless the jury are also satisfied, from the evidence, that the alleged damage was wantonly or intentionally caused by the defendant, his servants or agents."

The refusal of the charges asked, and the charges given to which exceptions were reserved, are now assigned as error.

JAMES BOND, for appellant.

T. A. HAMILTON, for appellee.

Stone, Ch. J. — We cannot say there was no evidence in this case tending to show contributory negligence on the part of the plaintiff. Hence we hold the Circuit Court was justified in submitting that question to the jury.

The first and second charges asked by plaintiff were rightly refused. They ignored the question of contributory negligence, upon which there was some testimony. Nor do we think the third charge of plaintiff should have been given. It is not shown any officer or employee of the railroad had any knowledge that plaintiff had taken a dangerous position in the "caboose," nor indeed is it shown there was any officer or employee in the car. Persons entering the "caboose," would be apt to observe whether or not it was attached to the train; and if there be danger in standing near an open side door in a car, when the train is starting, or in motion, it is not an unreasonable presumption, that persons of ordinary prudence are aware of it. In transitions from rest to motion, or from motion to rest, there is ordinarily some disturbance of the equilibrium, the result of *inertia*. This is common knowledge.

In the ninth charge given at the instance of the defendant the Circuit Court erred. True, before plaintiff could recover, it was incumbent on him to satisfy the jury that the defendant, his servants or agents, had been guilty of fault or negligence, and that he, plaintiff, had been thereby damaged. It was not his duty to prove that this damage had been done through no want of reasonable care on his part. Nor was it necessary that the jury should, by their verdict, affirm that plaintiff had not contributed to the injury. Contributory negligence is in its nature defensive, the disproof of which does not rest on plaintiff, unless in rebuttal of defensive testimony tending to establish it. Like the defense of payment, or set-off, when pleaded, a general verdict for the plaintiff is simply an assertion, or finding, that the defense had not been proved. The error of the

charge is, that it misplaced the *onus*, in the matter of contributory negligence. *Ind. & St. L. R. R. Co. v. Horst*, 93 U. S. 291 (1).

The sixth charge given is also subject to criticism. "Contributed in any way to the happening of the injury," is probably misleading. To come within the rule, plaintiff's negligence must contribute proximately to the injury inflicted.

Reversed and remanded.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. JONES (2).

Supreme Court, Alabama, December Term, 1887.

[Reported in 83 Ala. 376.]

PASSENGER INJURED IN DERAILMENT—DEATH—PROXIMATE CAUSE.—Where plaintiff's intestate was injured by the train on which she was a passenger being derailed, from which injuries she died, an instruction requested by defendant that the deceased had pneumonia before the accident, and that that was the cause of her death and not the derailment for which defendant would not be liable was properly refused, it being held that even if the deceased had pneumonia, or incipient pneumonia and it could be known that she would ultimately die of that disease, that fact would not necessarily, and as matter of law, relieve the railroad of all responsibility, for if the injury was caused by the negligence of the railroad company and if it contributed and hastened the passenger's death, the company would not be guiltless.

APPEAL from the Circuit Court of Jefferson. *Affirmed.*

"Action by Thomas F. Jones, as the administrator of the estate of his deceased wife, Mrs. Rebecca Jones, to recover damages of the defendant railroad company, as a common carrier, on account of personal injuries received by his intestate while travelling as a passenger in the defendant's cars, which, as he alleged, were caused by the negligence, unskillfulness, and want of care of the defendant or its servants, and resulted in her death. The accident occurred on the 21st November, 1883; Mrs. Jones died on the 30th November, and this action was commenced on the 6th March, 1884. The cause was tried on issue joined on the plea of not guilty, and the jury returned a verdict for the plaintiff, for \$20,000; but, on motion for a new trial,

1. *Ind. & St. L. R. R. Co. v. Horst*, 93 U. S. 291, is reported in 7 *Am. Neg. Cas.* 331.

2. Cited in *Richmond & Danville R. R. Co. v. Vance*, 93 Ala. 144, 9 *Am. Neg. Cas.* 11 *n.*, *post*.

the plaintiff consented to remit \$6,000, and had final judgment for \$14,000.

"On the trial, as appears from the bill of exceptions, 'the plaintiff's testimony tended to show that, on the 21st November, 1883, his intestate purchased a ticket, as a passenger on the defendant's road, from Birmingham to Warrior Station, and was on the train as a passenger; that near Newcastle, a station between Birmingham and Warrior, the coach in which she was riding was derailed, and she was thereby severely injured; that the derailment was caused by a loose wheel, which had been loose for several days, and could have been discovered by defendant with due and proper care; that the injury to his intestate was severe—that she had a rib broken, which caused her to take pneumonia, of which she died on the 30th November, 1883; also, that it was defendant's duty to have its cars and car wheels inspected at Birmingham, before permitting a train to go out, and that defendant had neglected this duty on this occasion. The defendant introduced evidence tending to show that the cars and car wheels of said train had been carefully inspected at Birmingham, before said train was permitted to go out, and no indication was then found of any defects in the cars or wheels, or any loose wheel on said train; that the wheels and axles were constructed of the best material, and were put together by hydraulic pressure, which was the proper means of putting the wheels on the axles; that said derailment was not caused by a loose wheel, but on account of a low or depressed joint in the rail or the track of the road; that such a sunken place in the track is liable to occur at any time, upon the best constructed railways; that defendant kept a section boss and hands at work on each section of its road, whose duty it was to go over their respective sections every day, and to keep the track in good order; that the conductor and engineer of said train were both skilled in the business, were careful men, and fully competent for their respective duties; and that said train was carefully and skillfully managed, conducted and controlled. The testimony for the defendant tended to show, also, that plaintiff's intestate was taking, or had incipient pneumonia, before the accident; that her death was caused from pneumonia, and not from the effects of the injury received; that she was but slightly injured by the accident, and had no rib broken at all; that the injury did not produce pneumonia; that her death was produced by natural causes, and not from any injury received from said accident; that at the time of the injury, and prior thereto, she was in a bad state of health; and that

the injury she received, if she had been in good health, would not have affected her seriously at all.'

"On this evidence, the court charged the jury, at the request of the plaintiff, as follows: 'If the jury believe from the evidence that plaintiff's intestate was injured through the negligence of the defendant, and that such injury caused her to take pneumonia, or aggravated the pneumonia from which she was then suffering, so that death resulted on that account; then plaintiff is entitled to recover, unless she would have died from pneumonia, as an independent cause, if she had not received the injury.'

"The defendant excepted to this charge, and requested the following charges in writing, duly excepting to the refusal of each:

"1. If the jury believe from the evidence that plaintiff's intestate, before the accident, had or was taking incipient pneumonia, and that she died from such pneumonia; then the presumption is, that the injury she received did not cause her death.

"2. If the jury believe from the evidence that, before the accident, plaintiff's intestate was taking or had incipient pneumonia, and that she died from such pneumonia; then the jury are authorized, from these facts, in connection with all the other facts in the case, to infer that the injury received at the time of the accident did not cause her death.

"3. If the jury believe from the evidence that, if plaintiff's intestate had been in ordinary health when the accident happened, her injury would not have produced death, and that her death was the result of bad health at the time of the injury; then plaintiff cannot recover in this action.

"4. If the jury believe from the evidence that defendant's train was thrown from the track, not from a loose car wheel, or from carelessness in the management of the car, train or engine, while in motion, but from a low or sunken joint in the track, and that the train being thrown from the track by said defect in it caused the injury complained of; then they must return a verdict for the defendant.

"5. If the evidence in the case leaves it doubtful, as to whether or not the death of plaintiff's intestate was caused by the injury she received while on defendant's train, or from natural causes, then the jury must find for the defendant.

"6. If the jury are in doubt, after weighing all the evidence in the case, as to whether the injury received by plaintiff's intestate while on defendant's train caused her death, or whether she died from natural causes; then they must find for the defendant."

The charge given, and the refusal of the several charges asked, are now assigned as error.

HEWITT, WALKER & PORTER and JONES & FALKNER, for appellant.

SMITH & LOWE, for appellee.

Stone, Ch. J. — The complaint in this case contains two counts. The *gravamen* of the first is, that the defendant negligently permitted a wheel of the trucks attached to the coach in which the plaintiff's intestate was being carried as a passenger, to become and remain loose, by which said coach was thrown from the track, injuring her, and causing her death. The second does not specify any particular omission of duty. Its averments are, that "the defendant did not use due and proper care or skill in and about the carrying of the said Rebecca Jones on the said journey, but so negligently and unskillfully conducted itself in that behalf, and in conducting, managing and directing the coach in which said Rebecca Jones was such passenger, * * * and the engine whereby the said train was drawn upon and along the said railway, that the coach which contained the said Rebecca Jones was thrown and cast with great violence from and off the rails of the said railway," etc. There was no demurrer to either count, but issue was taken upon them.

Two well-defined principles of law bear on the questions arising on the pleadings, and also must be kept in mind when we come to treat of the charges refused: First, in stating or averring matters which are, in their nature, more within the knowledge of the defendant than the plaintiff, less particularity is required. Second, if injury is suffered at the hands of a common carrier, the law, in the absence of all explanation, presumes it was the result of the carrier's fault, and casts on the latter the burden of overturning the presumption, or of showing that diligence and a careful observance of duty could not have prevented the injury. *Stephen's Pl.* 328, 329; *S. & N. R. R. Co. v. Bees*, 82 Ala. 340; *Leach v. Bush*, 57 Ala. 145.

"Skill" and "care," in and about the carrying of a passenger on a railway, are not confined to the mere competency and watchfulness of the officers in charge of the train; nor are these qualifications the only factors which enter into the inquiry, whether or not the carrier conducted itself negligently or unskillfully in the particular service. The track, locomotive machinery, or the rolling-stock may be unskillfully or negligently constructed, or may be negligently permitted to remain out of repair. If a railway corporation, in either of the conditions named, carry a passenger, and he suffer injury from defective structure, or failure to make proper repairs, this is negligence, or

unskillful conduct on the part of the corporation, and gives a right of action. And the defect of structure, or want of repairs, being much better understood by the corporation or person operating the road, than by the person who suffers the injury, it need not be averred with more particularity than is found in the second count in this case. *Leach v. Bush*, 57 Ala. 145; *E. T., Va. & Ga. R. R. Co. v. Carlross*, 77 Ala. 443; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

Lest we be misunderstood, we will repeat here what we have heretofore said. Railroads are not required to adopt every new invention. It is sufficient if they conform to such machinery and appliances as are in ordinary use by well-regulated railroad companies. *L. & N. R. R. Co. v. Allen*, 78 Ala. 494; *Ga. Pac. Railway Co. v. Propst*, at present term. [83 Ala. 518.]

Another principle of law bears on some of the rulings of the Circuit Court. Even if Mrs. Jones had pneumonia, or incipient pneumonia, at the time she received the injury, and it could be known that she would ultimately die of that disease; this would not necessarily, and as a matter of law, relieve the railroad of all responsibility. If the injury was caused by the negligence of the railroad company, under the rules declared above, and if it contributed and hastened her death, then the corporation would not be guiltless. *Tidwell v. State*, 70 Ala. 33; *Whar. Hom.* §382. This would be so in criminal prosecutions, and must be at least equally so in civil suit, such as this. In such case, the wrong and injury are, in fact, the cause of the death.

The charge given at the instance of the plaintiff is free from error.

If the plaintiff's intestate had pneumonia at the time she was injured, and died of it, it does not follow that the injury was not the real cause of her death, in this, that it so impaired her strength and vital force as to render the disease incurable, when, without the injury, it would have yielded to treatment. Nor, in such case, is there any presumption that the disease alone caused her death, rather than that the disease, augmented and accelerated by the injury, produced the result. These were questions for testimony, for argument, and for deliberation by the jury; but no legal presumption arises, either one way or the other, out of the facts hypothesized in the first charge asked by the defendant. The Circuit Court did not err in refusing this charge. The second charge is faulty, because its tendency would have been to withdraw from the minds of the jury all aggravating or accelerating effect the injury might have produced. Moreover, it is in substance an argument, and well calculated to mislead. It was rightly refused.

The third charge is, to some extent, subject to the same criticism as that we have indulged in reference to the second. If the hypothesis of its second clause had been, "that her death was *solely* the result of bad health," it would only have asserted the true doctrine in reference to the testimony before the jury.

The principles we have declared above, when considering the complaint, show that the court rightly refused to give the fourth charge.

The fifth and sixth charges raise the same question. To authorize a recovery in a civil suit, it is not necessary to establish the right beyond doubt. Such preponderance of testimony as produces reasonable conviction is enough. These charges were rightly refused. 3 Brick. Dig. 434, §§409 to 414; *Adams v. Thornton*, 78 Ala. 489; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335. There are authorities which hold, that when testimony is in equipoise, the finding must be against the party on whom the burden of proof rests. *Lindsey v. Perry*, 1 Ala. 203; *Vandeventer v. Ford*, 60 Ala. 610; *Wilcox v. Henderson*, 64 Ala. 535. These charges do not raise that question.

In *Life Association of America v. Neville*, 72 Ala. 517-521, is this expression: "While we fully recognize the principle, that whenever the evidence in a cause leaves a disputed fact in doubt and uncertainty, the issue must be found against the party upon whom the burden of proof rests." It was not intended in that case to declare that a mere doubt is enough to defeat a recovery in a civil suit. This disputed fact, to be within the principle declared, must not only be in doubt; it must be left in uncertainty. Certainty, in the law, has many intents, varying in degree. The concluding part of the sentence shows there was no intention to overturn or weaken the long-recognized rule, as to the measure of proof in civil suits. Its language is, that "courts and juries should rather weigh than count the testimony of witnesses, and a decree or verdict should never be found by them on a mere preponderance, which fails to produce a proper conviction, or satisfaction in their minds." That was a chancery case, and the duty rested on the court, not on a jury, to weigh the testimony.

We find no error in the record.

Affirmed

ALABAMA GREAT SOUTHERN RAILROAD COMPANY V. HILL (1).

Supreme Court, Alabama, November Term, 1889.

[Reported in 90 Ala. 71.]

INJURED IN DERAILMENT OF TRAIN—PERSONAL EXAMINATION OF FEMALE PLAINTIFF.—In an action to recover damages for injuries sustained by a female passenger being injured in a railroad wreck due to the train being derailed, where the plaintiff's injuries were alleged to be internal and permanent, the determination of which injuries could only be ascertained by a personal examination of the plaintiff, it was held, upon the facts of the case, that the examination by skilled and disinterested surgeons. would have been proper, and it was error to overrule the defendant's request for an examination (2).

CONDITION OF ROAD-BED—GROSS NEGLIGENCE—EXEMPLARY DAMAGES.—Where there was evidence tending to show that the crossties or a considerable portion of them at the point where the train was derailed were decayed, unsound and rotten, it was sufficient to charge the defendant with gross negligence, for which the jury were authorized to return a verdict for exemplary damages (3).

APPEAL from the City Court of Birmingham. *Reversed.*

"Action by Miss Nellie C. Hill against the appellant corporation, to recover damages for personal injuries sustained by plaintiff while travelling as a passenger on the defendant's road on September 27, 1887; and was commenced on February 7, 1888. The cause was tried on issue joined on the plea of not guilty, and resulted in a ver-

1. Cited in *Richmond & Danville R. R. Co. v. Vance*, 93 Ala. 144, reported below.

2. On the second trial of this case (*ALABAMA GREAT SOUTHERN RY CO. v. HILL*) the plaintiff recovered judgment on verdict for \$8,500, which, on appeal by defendant (November Term, 1890) was affirmed. The medical evidence developed the fact that plaintiff was injured in the spinal column and by displacement of her womb. The evidence as to the accident and the condition of the track was substantially the same as that adduced on the former trial. Reported in 93 Ala. 514.

3. Among other actions in Alabama relating to derailment of trains, etc., are the following:

CENTRAL R. R. & BANKING CO. v. CARR, 76 Ala. 388 (1884), an action for damages for injuries sustained in a derailment of a train. Defendant filed a plea in abatement to the jurisdiction of the court, alleging that it was a foreign corporation, having its residence and doing business in Georgia, and that the injury happened in Georgia, which plea was quashed. On appeal the judgment quashing the plea was reversed.

RICHMOND & DANVILLE R. R. CO. v. VANCE, 93 Ala. 144 (1890), action

dict for the plaintiff, for \$8,000. There are forty assignments of error, founded on all the rulings of the court adverse to the defendant. The principal question in the case, as here presented, was based on the refusal of the court below to require the plaintiff to submit to an examination of her person by physicians or surgeons, under the direction and control of the court, as stated more particularly in the opinion of this court. H. R. Allen, a witness for plaintiff, who was a passenger on the train at the time of the accident, was asked, whether he 'made any remark to the conductor just before the wreck occurred;' and answered, 'a few minutes before it happened, I called his attention—simply made a remark—asked him if the engineer was not whooping them up pretty fast that morning, or something to that effect.' The defendant objected to this question, and excepted to its allowance. The defendant requested the court to instruct the jury that, 'under the evidence in the case, the plaintiff cannot recover punitive or exemplary damages, but only such damages as will compensate her for the injuries she has sustained.' The court refused this charge, and the defendant excepted."

EDWARD COLSTON, SAMUEL F. RICE, and DENSON & WOOD, for appellant.

TALIAFERRO & SMITHSON, for appellee.

McClellan, J. — This is an action for personal injuries alleged to have been sustained by the plaintiff, in consequence of defendant's negligence, whereby a car, on which plaintiff was being carried as a passenger, was derailed and overturned. The injuries chiefly complained of, and relied on for the recovery, which was sought and had

for personal injuries sustained by Mrs. Vance in the derailment of the train on which she was riding. On the trial plaintiff had a verdict for \$2,500. Defendant reserved numerous exceptions to the rulings of the court. On appeal the court held that defendant's request to charge as to punitive damages should have been given and for failure to do so judgment was reversed. The request to charge was that punitive damages cannot be assessed if "the coach or rear trucks of the coach were not derailed in any way except by leaving the main line, and run-

ning into the siding at the point of the switch, and that the condition of the cross ties and rails at that point, though defective, was not sufficiently defective to have produced such a result, except by the aid of the broken bolt." The second count was a substantial copy of the second count of the complaint in the case of *L. & N. R. R. Co. v. Jones*, 88 Ala. 376, 9 Am. Neg. Cas. 5, *ante*. The case of *Ala. Gt. So. R. R. Co. v. Hill*, 90 Ala. 71, 9 Am. Neg. Cas. 11, *ante*, was cited on the question of punitive damages for gross negligence.

in the court below, are alleged to be internal and permanent in their nature, and very grievous, painful and dangerous. Neither the fact of their infliction, nor their extent, character, or probable consequences, were determinable, except by expert examination of the plaintiff's person in a manner most objectionable to a young woman of delicacy and refinement, as she is shown to be. Such examination had been several times made by her attending physician, who stood ready to testify, and did testify in her behalf as to the results of his investigation. Prior to the trial, on the day the trial was entered upon, and again pending the trial, after the plaintiff and her physician, and other physicians, had testified, the defendant moved the court for an order requiring plaintiff to submit to an examination by a reputable and disinterested physician, or physicians, to be appointed by and to conduct the investigation under the direction and control of the court, at the cost of the defendant. When this motion was last made, plaintiff's attending physician, Dr. Drennen, had testified fully as to her injuries, and Doctors Chew, Wyman and Whelan, who heard his testimony, had been examined in respect to the injuries described by him, and had, to a greater or less extent, drawn his diagnosis in question. In support of the motion, the affidavits of three reputable and experienced physicians were put in evidence, to the effect that the proposed examination would not be painful, or at all hazardous; that the injuries described in the complaint—which were the same deposed to by Dr. Drennen—were not of a character to produce such nervousness as would render the examination dangerous to the life or health of the plaintiff, and that if she was able to attend the trial of her case—which she did—the plaintiff could without risk sustain the ordeal of the proposed investigation. On the other hand, two affidavits were offered against the motion. One by Drennen, that the plaintiff was a delicate and refined female, about nineteen years old, of nervous temperament, and had been rendered exceedingly nervous—even hysterical—by the shock of the accident and the consequent ills which had since afflicted her; and that the proposed examination would involve danger to her health, though it appears from this affidavit that he himself had made "several thorough surgical examinations of the plaintiff," of the kind proposed, without any ill results therefrom. The other opposing affidavit was by one of the plaintiff's counsel. He deposes to her age, delicacy of feeling, nervous temperament, low state of health, etc., to the high standing of Drennen as a physician and surgeon, and to the facts that Drennen had made the

physical examinations proposed by the motion, and would testify in regard thereto on the trial. On this state of facts, the court severally and successively overruled the motion each time it was presented, and refused to require the plaintiff to submit to a physical examination. The propriety of this action of the court is one of the leading questions presented by this appeal.

The authorities are somewhat conflicting on the point thus presented. A pioneer case, declaratory of the power of courts to require the plaintiffs, in actions of this character, to submit themselves to physical examinations by experts, a case, too, which is put forward by the appellant as a leading one in support of the right which the lower court denied it, is that of *Walsh v. Sayre*, 52 How. Pr. 334, decided by the Special Term of the Superior Court of New York. This case was approved by the Special Term of Common Pleas of New York, in *Shaw v. Van Rensselaer*, 60 How. Pr. 143, in an *obiter dictum*, though an application for an inspection of the person was denied on the facts there presented. Subsequently, the question came under review in the Supreme Court of that State, and Sayre's case was in effect overruled, and the power of the courts to order an inspection of a plaintiff's person was repudiated and denied. *Roberts v. O. & L. C. R. R. Co.*, 29 Hun, 154. So that the law may be considered settled in the State of New York, against the exercise of this power by the courts.

In Missouri, the course and history of judicial opinion on the subject had been precisely the reverse of that exhibited in New York. The Supreme Court of Missouri first held, that "the proposal to the court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law, * * * and the court had no power to enforce such an order." *Loyd v. H. & St. J. R. R. Co.*, 53 Mo. 509 (1). Afterwards, this decision was seceded from, and the doctrine thoroughly established in that State, that the trial court has the power to require the plaintiff to submit to surgical examination as to the character of the injuries complained of; but that defendant has no absolute right to demand an order for such investigation, and such examination is a matter of discretion with the court, the exercise of which will not be interfered with unless manifestly abused. *Shepard v. Mo. Pac. Railway Co.*, 85 Mo. 629; *Sidekum v. W., St. L. & P. Railway Co.*, 93 Mo. 400; *Owens v. K. C.*,

1. *Loyd v. Hann. & St. J. R. Co.*, 53 Mo. 509, is reported in 4 Am. Neg. Cas. 481.

St. J. & C. B. R. R. Co., 95 Mo. 165 (1). The power of courts to this end is denied by courts in Illinois, in a very meagre, unreasoned, and unsupported opinion of the Supreme Court, in which the subject is dismissed with the assertion that "the court had no power to make or enforce such an order." *Parker v. Enslow*, 102 Ill. 272.

It is believed that no other than the cases referred to can be found, which deny the *power* of trial courts to require plaintiffs, in actions for personal injuries, to submit themselves to surgical examinations in respect thereto. Of these, one has been expressly and repeatedly overruled; another appears to have been decided without due consideration of the question, and investigation of the adjudications upon it; and the third and only other alone remains as an authority for the non-existence of the power. On the other hand, the Missouri cases *supra*, and many others, concur in the establishment of the following propositions: 1. That trial courts have the power to order the surgical examination by experts, of the person of a plaintiff who is seeking a recovery for physical injuries. 2. That the defendant has no absolute right to have an order made to that end and executed, but that the motion therefor is addressed to the sound discretion of the court. 3. That the exercise of that discretion will be reviewed on appeal, and corrected in case of abuse. 4. That the examination should be ordered, and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure, or more certain ascertainment, of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to plaintiff's life or health, and without the infliction of serious pain. 5. That the refusal of the motion, where the circumstances present a reasonably clear case for the examination under the rule last stated, is such an abuse of the discretion lodged in the trial court as will operate a reversal of the judgment in plaintiff's favor. *Thompson on Trials*, §859; *Schroeder v. C., R. I. & P. R. R. Co.*, 47 Iowa, 545; *S. C. & P. R. R. Co. v. Finlayson*, 16 Neb. 578; *Stuart v. Havens*, 17 Neb. 211; *A., T. & S. F. R. R. Co. v. Thul*, 29 Kan. 466; *M. & M. T. Co. v. Bailey*, 37 Ohio St. 104; *I. & G. N. Railway Co. v. Underwood*, 64 Tex. 463; *Hatfield v. St. Paul & Duluth R. R. Co.*, 33 Minn. 130; *R. & D. R. Co. v. Childress*, 82 Ga. 719; *Sibley v. Smith*, 46 Ark. 275; *White v. M. C. Railway Co.*, 61 Wis. 536.

1. *Owens v. Kan. City, St. Jos. & C. B. R. R. Co.*, 95 Mo. 169, is reported in 4 Am. Neg. Cas. 590.

The doctrine of these authorities has been fully recognized in Alabama, in a case decided at the present term (*McGuff v. State*, 88 Ala. 147); and has quite recently been acted upon by this court in a proceeding for divorce, even to the extent of requiring both the complainant and the respondent to submit their persons to expert physical examination. *Anonymous*, 7 So. Rep. 100; 89 Ala. 291. See, also, *Anonymous*, 35 Ala. 226. Indeed, the propriety of a resort to this practice in divorce cases, even with respect to the defendant, has been long established. *Devanbagh v. Devanbagh*, 6 Paige's Ch. 554; *Le Baron v. Le Baron*, 35 Vt. 365; *Newell v. Newell*, 9 Paige's Ch. 25.

It is apparent from the adjudged cases, that the statement of the rule as to the revision of the trial court's action on a motion of this sort, to the effect that such action will not be interfered with unless it involves a manifest abuse of discretion, is inapt and misleading. What is really meant—the rule fairly deducible from the opinions—is, that if a proper case for granting the motion is clearly made, and is refused, the appellate court, having before it all the facts involved in the determination of the matter in the lower court, will reverse the judgment thus infected with error. An examination of those cases which are most emphatic in holding this matter to be in the trial court's discretion, free from appellate interference except in the contingency of manifest abuse, demonstrates the soundness of the construction we have placed on them. The Missouri cases, for example, while affirming the broad doctrine of non-interference, except where discretion has been manifestly abused, in each instance give reasons for not reversing *nisi prius* action, which show that that action, upon the strictest rules of appellate inquiry, was free from error. Thus, the reasons given in *Shepard's Case*, was, that, "the order asked by the defendant was unreasonable, in that it asked that this lady should submit to personal examination, not by one skilled surgeon, but by at least three; * * * and this, when she had once submitted to such an examination by Dr. Jackson, and again offered to submit to an examination by an eminent and reputable surgeon and physician of the city of St. Louis, where the cause was pending; but this did not satisfy the defendant, who proposed to summon a number of physicians and surgeons to participate in the examination." *Shepard v. Mo. Pac. Railway Co.*, 85 Mo. 634. The refusal of the motion in the case of *Owens v. K. C., St. J. & C. B. Railway Co.*, 95 Mo. 169 (1), was based on the ground, that without

1. See 4 Am. Neg. Cas. 590.

such examination there was abundant evidence as to the nature, cause, and extent of the injuries complained of; in other words, the appellate court could see that a proper case had not been made for the examination, in that no necessity for it was shown, and the ends of justice could be met without it. The facts in *Sidekum v. St. L. & P. Railway Co.*, 93 Mo. 400, were strikingly like those arising on the motion in the present case, so far as testimony adduced by plaintiff is concerned. The application was made before the trial was entered upon, and refused "for the time being." The Supreme Court say: "The action of the trial court upon said motion, as we have seen, was merely a refusal to grant the same for the time being; and as the defendant did not renew its application for such order, at any stage of the proceeding, the court may have well concluded, that after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bone, which we have given in substance (and which was of much the same character as that given by Dr. Drennen in the case at bar), defendant did not deem it necessary to renew his motion, or to insist thereon, but had abandoned the same." The clear and necessary implication is, that had the motion been renewed on a state of facts precisely like those involved here, omitting the affidavits and evidence of the physicians called by the defendant, its refusal would have been an error requiring the reversal of the judgment.

What we have said applies also to the other cases cited, except that of *Sibley v. Smith*, 46 Ark. 275, which states the rule as deduced from the adjudged cases to be, "that where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of the surgeon upon his condition—an opinion based upon personal examination. In refusing to order the examination, as it may do when the evidence of experts is already abundant, the Circuit Court must exercise a sound discretion; and its action is subject to review in case of abuse." And the judgment below was reversed, and the cause remanded, really on the ground that a proper case had been made for the exercise of the court's discretion favorably to the application for an examination, and its refusal to so order was, therefore, a reversible error.

Guided by the rule deducible from these authorities, rather than by the expressions used when they attempt a formulation of it, we shall consider whether the defendant clearly presented a case upon which the lower court should have ordered the examination moved

for. We are satisfied from the evidence which was before the court when the last application was made, that such an examination would not have involved any ill consequences to the plaintiff. She had submitted to be so examined several times by Dr. Drenner safely, and even without pain. The fact that she was of a nervous temperament, or in a nervous condition, involved no tenable objection, especially in view of the opium habit which she had contracted and which could, without hurt to her, have been utilized to all nervousness. Her delicacy and refinement of feeling, though, course, entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on one hand, and possible injustice to the defendant, on the other, the law cannot hesitate; justice must be done. Was it essential to the ends of justice that plaintiff should submit to this examination? We think it was. It is true, that Dr. Drennen had made the examination, and had fully deposed to the injuries complained of. But he was the plaintiff's physician, and her witness. His sympathies were naturally with her, operating a bias in her favor, even without consciousness of it on his part. Moreover, as we have said, his conclusions and opinions from the premises he testified to, did not have the approval or concurrence of the several other reputable surgeons and physicians who were examined as to their conclusions from the facts stated by him. A serious doubt was thus raised as to whether they were the real facts in respect to the injuries. To a satisfactory solution of that doubt the examination moved for was essential. The result of such examination by skilled and disinterested surgeons under the directions of the court, would necessarily have been to put the plaintiff's claim in this regard on impregnable ground, or to have destroyed it altogether; and in either case, there would have been an unquestioned assurance that justice had been done. An assurance which finds no secure anchorage in the present decision. Our opinion is, that the court erred in overruling the defendant's motion for the examination.

We shall notice briefly only such other assignments of error as are insisted on in argument.

We discover no error in the rulings of the trial court on the question of punitive damages. There was evidence in the case tending to show that the cross-ties, or a considerable portion

under the track at the point of the derailment of the car in which plaintiff was riding, the wreck being the result of a broken rail, were "unsound," "decayed," "rotten;" that the rail which broke was an "old rail," as were others along there, and that the defendant company was "constantly repairing that old track with old rails." With the weight or sufficiency of this evidence we have nothing to do. Whether or not its tendencies were entirely rebutted by other testimony, is also beyond our inquiry. Those were questions for the jury. We are satisfied that it tended to show a condition of the track, not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness—such indifference to the probable consequences of its continued use—such disregard of the safety of passengers being transported over it—as is the equivalent of intentional wrong, or a willingness to inflict the injuries complained of. And if the jury found the facts to be in accordance with this tendency of the testimony, they were authorized to return a verdict for exemplary damages.

It has been many times ruled by this court, that the refusal of the lower court to grant a new trial is not revisable.

The declaration of Allen to the conductor, made before the accident, indicating Allen's opinion that the "engineer was whooping them up pretty fast that morning," was, in our opinion, inadmissible. *L. E. & W. Railway Co. v. Loffinger*, 15 Amer. & Eng. R. R. Cases, 371; *M. & M. R. R. Co. v. Ashcraft*, 48 Ala. 15. Facts may possibly be adduced on another trial which will legalize this evidence, but they do not exist in this record.

We discover no error in the other matters urged in argument.

Reversed and remanded.

INJURED AT STATION—DEFECTIVE BRIDGE LEADING FROM TRACK TO HOTEL AND TICKET OFFICE.— In an appeal from the City Court of Anniston in actions by Iverson E. Watson against the Oxanna Land Company and the East Tennessee, Virginia and Georgia Railroad Company, respectively, for personal injuries suffered by reason of a defect in a bridge on the right of way of the railroad company, and leading from its track, across a small stream, into a hotel of the land company, in which also were the ticket office and baggage room of the railroad company, the facts are stated in the opinion by the court as follows: "The place was a regular station, and the hotel an eating house for passengers, on the East Tennessee, Virginia & Georgia Railroad. Plaintiff was a passenger on a train which stopped, as was usual, opposite the hotel for supper, and he got off the train, and went into

the hotel to see a man by previous appointment, and not for the purpose of eating his supper. He went from the train into the hotel by another bridge which leads into the hotel proper, and was injured while returning to the cars by the defective bridge which leads to the railroad offices in the south part of the hotel, and, along that end of the building, to the track of another railway on the opposite side. In the case against the land company the evidence was without conflict that the defendant had constructed both bridges. The one leading into the hall of the hotel was built for the use of passengers passing to and from trains, was under the control of the land company, and kept in repair by it. The other one, on which the injury occurred, was built for use in the handling and transfer of baggage between the two roads, and between the defendant road and the hotel. This bridge, though constructed by the land company, was on land belonging to the railway company, was turned over to it for the purpose stated, and was not under the control or in care of the land company, and that company did not take upon itself the duty of keeping it in repair. For aught that appears, therefore, in the case of *Watson* against the land company, this bridge was a part of the ways or works of the railway company, put there for it by the land company, and maintained by the road for its own use and convenience. We cannot conceive how the mere fact that the *Oxanna Land Company* had constructed the bridge, and presented it to the railroad, could impose any liability on that company for an injury not resulting from its construction, or from the fact of its being turned over to the road, but entirely from a failure of the railway company to keep the bridge in repair, a duty which, on this evidence, rested alone on that company. We, therefore, concur in the conclusion of the judge below—there being no jury—that plaintiff was not entitled to recover from the *Oxanna Land Company*, and the judgment in that case is affirmed.

“In the case against the railway company, the evidence for the plaintiff consisted of his own testimony, which, with respect to the character, location and uses of the bridge, and the relations borne to it by the defendant company, is as follows: ‘The *Oxanna* hotel is situated between the tracks of the defendant’s road and of the *Georgia Pacific* road, and has a hall through it east and west. *Snow creek*, a small stream, runs between the hotel and defendant’s track. There is a platform along and parallel with defendant’s track about one hundred and fifty feet long, which is connected with the hall through the hotel by a platform, and also by another platform running along the south end of the hotel to the *Georgia Pacific* railway track. This last mentioned platform is the one on which the accident occurred. Defendant’s ticket office at *Oxanna* is in the south room of the hotel next to defendant’s road; and the main entrance to said room is from and through the hall before mentioned; but this room also has an entrance from said platform along the south end of the hotel, and the witness had often seen people enter the ticket office by both of said entrances. The water-closet is next to this south door; and the ticket office room is also defendant’s bag-

gage room, and witness had checked baggage there, and seen others do so frequently. When trains stopped at Oxanna, one coach would be opposite the platform leading into the hall of the hotel and the other would be opposite the defective platform leading along the south end of the hotel upon which the ticket office opened on that side. Witness had frequently seen passengers go to and from the train of the defendant to said hotel along both of said platforms; but the entrance most generally used for passengers in getting on and off trains was through the hall in the hotel; and the rear platform, where plaintiff was hurt, was mostly used for transferring baggage from one road to the other by employees of the respective roads. On the night of the accident there were no lights on either of said platforms except the light which shone through the windows of the train and hotel. When he stepped into the hole he was walking toward the train and the light through the car windows rather blinded him, and he could not see the hole, but he could have seen it had he been specially looking for it. He stepped into the hole before he saw it, or knew it was there.' Plaintiff also testified that the hole into which he fell was thirty-seven feet from the center of defendant's track. The only evidence on the part of the defendant consisted of a statement as to what two absent witnesses would swear, which plaintiff admitted as their testimony on the trial. This statement was as follows: 'The platform at Oxanna station where plaintiff claims to have been injured was erected by the Oxanna Hotel Co. for the convenience and use of said company. Defendant did not consent to the erection of said platform, or undertake to maintain it. The hotel company erected it, and agreed to maintain it and keep it in repair for the use and convenience of its guests. There were lights on the platform and about the hotel every night and at the time plaintiff claims to have been injured; and he might have seen the hole in the platform if he had looked carefully.'

"It is, we think, a fair inference from all the evidence, though the fact is no where affirmatively stated in this case, that the defective platform was on defendant's right of way, else why should the matter of the defendant's consent to its erection be of importance, and why the agreement between defendant and the hotel company that the latter should maintain it, and keep it in repair? Moreover, it may be said to be judicial knowledge that the rights of way of railways usually extend fifty feet on either side from the center of the track. But aside from this, the testimony of defendant's witnesses, even when accorded its broadest significance does not overturn plaintiff's evidence going to show that this platform was used as a part of defendant's station grounds at Oxanna for the purpose of transferring baggage to and from its own station offices and to and from the Georgia road. It seems clear, too, that one of the two routes from defendant's ticket office and baggage room, and one that was equally as direct as the other, and even more so where the purpose was to board the coach next the south end of the train, lay across this defective bridge or platform; and plaintiff's testimony that he had frequently seen passengers go to and from defendant's

trains along this, as well as the other platform, is uncontroverted. The evidence does not inform us that the use of this platform by passengers was ever forbidden by the defendant. On the contrary, if the testimony of defendant's witnesses, admitted in the shape of the statement we have copied, is to be taken as referring to this platform, it was constructed for the purpose of being used and maintained for the use of guests of the hotel in passing to and from the train. And as this hotel was an eating house for the train, the defendant company, all travellers by such of defendant's trains as stopped there for meals were expected and invited by the company to cross over upon this bridge. On the other hand, if the statement of these witnesses in this respect has reference to the other platform described by the plaintiff, it relates throughout to that other platform alone, and leaves no evidence in the case as to the defective platform, the light upon it, etc., etc., except that of the plaintiff. So that in any view of their testimony, we feel quite safe in the conclusion that the route by the defective platform was a recognized way of ingress and egress to and from defendant's trains, open to persons passing not only from its station offices, but from the Georgia Pacific Hotel, and it would seem from the town of Oxanna. Not only so, but it was upon defendant's right of way or station grounds. Whether it was erected by the defendant is wholly immaterial. Whether it was defendant's habit to repair and maintain it, is likewise wholly immaterial. The defendant allowed it to remain there, a standing invitation and suggestion to its use by passengers. The suggestion was acted upon without objection. The invitation was accepted by passengers frequently used this platform in going to and from the train. As long as this state of things continued, the duty to repair and keep in a safe condition was upon the defendant. The defendant's previous omission of duty in this regard could justify the accident which caused the accident complained of. It can not, of course, be tolerated that a duty of this sort resting on the railroad company could be lifted and devolved upon another by contract between the railroad and the hotel, so as to exonerate the company from any liability it would be under to third persons for the consequences of a failure to charge the duty itself; and the defendant can have no advantage against the plaintiff from the fact that the hotel company had been taken to keep the bridge in repair. Moreover, to recur again to the statement admitted in evidence, it is not at all clear that the duty of the hotel company to keep in repair pertained to the bridge in question. But however that may be, the bridge was on the station ground of the defendant. It was a part of the defendant's way leading to and from defendant's trains. It was in a defective condition. This condition was, or should have been, known by the defendant. Its failure to know the fact, or knowing it and failing to repair the bridge, obviate the defect, and render the platform safe, was, reason and authority leave no room to doubt, negligence on its part as to import a liability for the injury to the plaintiff, unless his own negligence proximately caused the injury thereto. [*M. & E. Ry. Co. v. Thompson*, 77 Ala. 448;

R. Co. v. McLendon, 63 Ala. 266; A. G. S. R. R. Co. v. Arnold, 84 Ala. 159; Cross v. L. S. & M. S. Ry. Co., 69 Mich. 363; s. c. 13 Amer. St. Rep. 399.]”

The court held that the defense of contributory negligence was not made out. Judgment reversed. KELLY & SMITH appeared for appellant; E. H. HANNA, for the land company; KNOX & BOWIE, for the railroad company. Opinion by McCLELLAN, J. *Supreme Court, Alabama, November Term, 1890. Watson v. Oxanna Land Company and Watson v. East Tennessee, Virginia & Georgia Railroad Company.* 92 Ala. 320 (1).

HIGHLAND AVENUE AND BELT RAILROAD COMPANY V. DONOVAN.

Supreme Court, Alabama, November Term, 1891.

[Reported in 94 Ala. 299.]

BOY THROWN OFF FRONT PLATFORM OF CAR.—Where plaintiff, a boy sixteen years of age, finding no room inside a car of defendant's which he had boarded, stood on the front platform, and as the car rounded a curve, other persons on the platform were pressed against plaintiff who was thrown off and had his ankle broken, the company was held liable for negligent operation of the train.

RIDING ON FRONT PLATFORM—WHEN NOT NEGLIGENCE.—

Where there was no other position on the train open to plaintiff, it was not negligence for him to ride on the front platform although he knew the carrier's rule forbidding persons to ride thereon, and the conductor having impliedly invited him thereon and accepted him as a passenger, his safe carriage was assumed by defendant.

APPEAL, from the City Court of Birmingham. *Affirmed.*

“Action by William Donovan, a minor, suing by next friend, against the appellant corporation, to recover damages for personal injuries by being thrown from one of the defendant's cars on which he was a passenger on the morning of September 30th, 1889. The plaintiff was about sixteen years old, and was going to school when he got on the car at a regular station, carrying his school-books and umbrella. He testified that, finding the rear platform full of people, he got on the front platform, where several persons were also stand-

1. On the subsequent trial of the action against the railroad company, plaintiff recovered judgment for \$400, from which defendant appealed. On appeal judgment was affirmed. *EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD CO. v. WATSON,* 94 Ala. 694 (1891).

ing; that the conductor passed him, collected his fare, and pushed through into the car; that he looked through the window into the car, 'and saw that the seats were crowded, and that the aisle between the seats was full of people standing, and he had to stay where he was.' He was asked this question, 'What appearance did it have as they were standing in that way?' and answered, 'that it was more crowded near the door than at the center, and that people were hanging on by the straps all along.' The defendant objected and excepted to the allowance of this question, but not to the answer. The evidence showed that the car was drawn by a dummy engine that as it passed around a curve at the intersection of two streets the persons standing on the front platform were swung or pressed against plaintiff, and he was thrown off, breaking his right arm. He had previously lost his left leg, and was wearing a wooden leg. The jury gave him a verdict for \$1,000.

"The court gave the following charge to the jury, on request of the plaintiff: 'If the jury believe from the evidence that, under circumstances of the case, there was a reasonable necessity, either real or apparent, for the plaintiff to travel on the platform of the car and that he made such effort to obtain accommodation inside of the car as an ordinarily prudent man would have made under similar circumstances, then he was not guilty of negligence by reason of standing or travelling on the platform.' The defendant excepted to this charge, and also to the refusal of each of the following charges which were asked in writing: 1. 'There is no evidence that the rate of speed at which the car was moving around the curve was dangerous or negligent.' 2. 'If the plaintiff got on to the platform of the car, with knowledge that the car was so crowded that he could not get a seat, and could not get in, and with knowledge that the rules of the company prohibited his standing on the platform, this would be negligence on his part, which would defeat a recovery.' 3. 'If the jury believe the evidence, they should give a verdict for the defendant.' 4. 'If the jury believe from the evidence that the car was filled with passengers when plaintiff boarded the car, and the platforms were also filled with passengers, and he knew when he got on the car that he could not get a seat, and could not get inside the car; then, his getting on the platform with this knowledge, and remaining there, was voluntary, and would defeat a recovery.' 5. 'Plaintiff having testified that he knew of the existence of the curve at the intersection of the two streets, he was presumed to know the effect of the car going around the curve at that point. If, with this knowledge, he stood on the front platform, ou

the curve, which was the most dangerous place, then he would be guilty of negligence, which would defeat a recovery.' 6. 'If the jury believe from the evidence that plaintiff saw the crowded condition of the car and platforms, as testified by him, and knew that the rules of the company prohibited him from standing on the platform, and with this knowledge got on the car, and stood on the platform, and failed to request the conductor to give him a place in the car, and by reason of being on the platform contributed directly to the injuries he sustained, he can not recover.' 7. 'The existence of an apparent necessity to the plaintiff for him to stand upon the platform, will not excuse his negligence for being on the platform.'

The admission of the evidence objected to, the charge given, and the refusal of the charges asked, are assigned as error.

A. T. LONDON, for appellant.

WEATHERLY & PERCY, for appellee.

McClellan, J. — What constitutes the exercise of due care, and, conversely, what amounts to negligence, depends in all cases, of course, upon the circumstances surrounding the person whose conduct, in these respects, is under investigation. A man may be negligent in failing to ascertain his environments, no less than in the omission of that course of action, with respect to a situation known to him, which prudence dictates. But, having been duly careful to acquaint himself as best he may with all the facts which should have a legitimate influence in shaping his conduct, his subsequent action is to be gauged with respect to the observance or lack of care and caution, not by the real facts which, or some of which, his circumspection may have failed to disclose to him, but by the appearance of things as uncovered by that degree of effort to ascertain the real facts which men of ordinary prudence would put forth in the premises. In other words, "he is not bound to see; he is bound to make all reasonable efforts to see that a careful, prudent man would make in like circumstances. He is not to provide against any certain results. He is to make an effort for a result that will give safety—such an effort as caution, care and prudence will dictate." *Greany R. R. Co. v. Long Island R. R. Co.*, 101 N. Y. 419; s. c., 24 Amer. & Eng. R. R. Cases, 476.

There is evidence in the record going to show that, when the plaintiff boarded defendant's car—there being only one in the train—every seat and the aisle were occupied, that the rear platform was also fully occupied, and that there were several people on the front platform. Plaintiff, finding he could not get on the rear, went to and took a position on the front platform. From this position, which

afforded a view through an open window of the whole interior of the car, it *appeared* to him that there was no available space for him on the inside. If the jury found the facts in line with these tendencies of the testimony, they would have been justified in finding further that the plaintiff exercised due diligence and caution in ascertaining the situation, and hence had a right to act upon the facts which such diligence and caution disclosed, whether they were the real facts or not. It follows that, assuming proper circumspection to have been observed by plaintiff, evidence as to whether the car presented the *appearance* of being entirely full was pertinent, and properly received, and the charge requested for plaintiff, which authorized the jury to find plaintiff free from negligence in taking a position on the platform if there was a reasonable necessity, real or apparent, for his doing so, correctly stated the law. The application of this principle to charge 7 requested by defendant must lead to its condemnation as being misleading in itself, and affirmatively bad when read in the light of the evidence.

2. It is insisted for the appellant, that the assumption of a position on the front platform was negligence as a matter of law in the plaintiff, for that a rule of the carrier, which was shown to him, forbade his doing so. Ordinarily, no doubt, this would be true; but, in this instance, it is not on one phase of the evidence, for the reason that there was no other position on the train open to plaintiff, and he was impliedly invited by the conductor to take this position, accepted as a passenger while occupying it, and his safe carriage while occupying it was assumed by the defendant. A tendency of the evidence goes to show that the position was not obviously a dangerous one, and would have been unattended by danger or injury in this instance had the carrier exercised due care in operating its train. On these tendencies of the evidence, the whole question of negligence *vel non* on the part of the plaintiff, so far as the known rule of the company and the supposed inherent danger of the position bear upon it, was one of fact for the determination of the jury. Charges 3 and 5 asked by defendant involved the determination of this question by the court, and were properly refused. *Railway Co. v. Wallin*, 2 Am. & Eng. R. R. Cases, 20 (notes); *Willis v. L. & B. R. R. Co.*, 34 N. Y. 670; *Nolan v. B. C. & N. R. R. Co.*, 3 Am. & Eng. R. R. Cases, 463; *L. R. & F. S. R. R. Co. v. Miles*, 13 Am. & Eng. R. R. Cases, 10; *L. I. R. R. Co. v. Werle*, 21 Am. & Eng. Cases, 429; *N. H. & C. Ry. Co. v. May*, 27 Am. & Eng. R. R. Cases, 151; 2 Am. & Eng. Ency. of Law, p. 766, (n. 5.)

The judgment of the City Court is affirmed.

HILL v. BIRMINGHAM UNION RAILWAY COMPANY.

Supreme Court, Alabama, November Term, 1893.

[Reported in 100 Ala. 447.]

INJURED ON CAR—PASSING FROM ONE CAR TO ANOTHER—CONTRIBUTORY NEGLIGENCE.—Where a passenger, while the train was in motion, attempted to pass from one car to another, and the speed of the car being accelerated by a sudden jerk, was injured while on the footboard of an open car, his negligence in so attempting to pass from one car to another precluded recovery in an action against the railway company (1).

APPEAL from the City Court of Birmingham. *Affirmed.*

"Action by the appellant against the appellee to recover damages for personal injuries alleged to have been sustained by reason of the

1. **BARKER v. ANNISTON, OXFORD & OXANNA STREET RAILWAY CO.**, 92 Ala. 315 (1890), was an action for injuries to plaintiff while traveling as a passenger on defendant's street railway. The suit was commenced in the name of Mrs. Barker, as the sole plaintiff in the action, and within the period of one year as required by the statute.—Code, 1886, §2619. After the lapse of more than a year from the time of the accident, the complaint was amended, on demurrer being sustained for non-joinder of proper parties plaintiff, by adding James Barker, the original plaintiff's husband, as a co-plaintiff with her in the action. The main questions raised by this appeal were whether the court below erred in ruling that the husband was a necessary party plaintiff; and whether the case made by the amended complaint, brought in the name of both the husband and wife, was barred by the statute of limitations of one year. The rulings of the Circuit Court of Calhoun held correct and judgment was affirmed.

In **WESTERN RAILWAY OF ALABAMA v. WALKER**, 113 Ala. 267

(1896), it appeared that Mary E. Walker, while a passenger on one of defendant's trains, was injured in a collision between that train and another, the passenger train being thrown partially from the track, whereby plaintiff was thrown violently to the floor of the car and her leg was broken at the hip joint. On the trial in the Macon Circuit Court plaintiff recovered judgment for \$6,000. On appeal judgment was reversed, the court holding that the facts did not disclose negligence on the part of defendant. It was held that a railroad company is not liable in damages for personal injuries to a passenger, if there was not negligence in the operation or equipment of the train alleged to have produced the accident which resulted in the injury, but the accident was caused by latent and undiscoverable defects in the appliances of the train, or by reason of the interference of a stranger with such appliances; provided those in charge of the train promptly and properly used all means known to skillful trainmen to prevent the accident.

defendant's negligence. Judgment for defendant and plaintiff appeals.

"The facts of the case are sufficiently stated in the opinion. Upon the examination of the plaintiff as a witness he was asked the following question: 'Whether or not he knew it was customary for passengers to pass from one car to another while the train was in motion?' The defendant objected to this question, the court sustained the objection, and the plaintiff duly excepted. After stating that he had been passing over said road constantly for two or three years, the plaintiff was asked the following question: 'Did not persons or passengers usually pass from one of said cars to another while the said train was in motion, stepping from the foot board to the steps of the adjoining cars?' The court sustained the defendant's objection to this question, and the plaintiff duly excepted.

"Upon the examination of one W. L. Timberlake, superintendent of the defendant's road, he testified that the rules of the company were in writing posted inside the car; and was then asked the following question: 'Whether or not the rules of said company prohibited passengers from standing on the running boards; and also if passengers were prohibited by said rules from passing from one car to another in the manner described in the testimony of the plaintiff, while the train was in motion.' The plaintiff objected to this question, on the ground that if said rules were in writing, the best evidence was the rules themselves. The court overruled his objection, and the plaintiff duly excepted to the witness testifying if there were such rules.

"On cross-examination the said Timberlake was asked, 'If it was not usually customary for persons or passengers to pass from one car to another by way of the foot-boards to the steps of said car.' The defendant objected to this question, which objection was sustained by the court and the plaintiff duly excepted.

"Upon the introduction of all the evidence the court, at the request of the defendant, gave the general affirmative charge in its behalf."

BUSH & BROWN, for appellant.

HEWITT, WALKER & PORTER, for appellee.

McClellan, J. — The inquiry of contributory negligence *vel non* was in the first instance gone into by the plaintiff, and evidence was also adduced upon it by the defendant without objection. That issue was treated by both parties throughout the trial as being in the case; and on the theory that the undisputed testimony showed contributory negligence the court gave the affirmative charge, with hypothesis, for the defendant. On this state of the record we shall treat

that issue as having been presented and litigated on the trial though no plea of contributory negligence was interposed. *Richmond & Danville R. R. Co. v. Farmer*, 97 Ala. 141.

The plaintiff attempted to step from the foot-board running along the side of an open dummy line car to the steps leading down from the platform of a close car while the train of which the cars constituted a part was in motion. The distance between the running-board and the step was variable from two and a half to three and a half feet, depending upon whether the couplings between the cars were more or less taut or slack. The conditions in this regard at the moment of plaintiff's attempt are not disclosed in the evidence. The train was approaching the crossing of another railroad, its speed being slackened as if the trainmen intended to stop before reaching the crossing as required by statute. Instead of coming to a stop, however, the speed was accelerated with a sudden jerk just as plaintiff was in the act of stepping from one car to the other, and this sudden increase of momentum threw him partially under the train where he received the injuries complained of while he still clung to the railing of the open car. Plaintiff had originally gotten on an open car in front of that from which he attempted to step at the time of the injury and finding no seat there and seeing that the other open car was crowded determined to go back to the close car for the purpose of finding a seat. To this end he got off the front car when the train stopped for a railway crossing and on the foot-board of the second car, his purpose then being to go from that to the close car when the train should stop for the second crossing. But without waiting for it to stop at the second crossing though the indications were and he supposed that it would, he attempted to get from the second to the third car by stepping across while the train was still moving in the manner we have stated, instead of getting off on the ground and then on the closed car as he had done in going from the first to the second car. This statement presents the case so far as the conduct of the plaintiff is concerned in the most favorable aspect to him that any tendency of the evidence admits of. Upon it we are satisfied that as matter of law he was guilty of negligence which proximately contributed to his injury. Neither the running board of an open or the steps of a close dummy line car are intended to be used as a means of passing from one car to another. Ordinarily there is no necessity or occasion for passing through the trains of this class of roads and generally we believe no provision is made to that end. The running board of the one and the steps of the other are intended to be used merely for ingress

and egress to and from the car to which they are attached. The distance between the two in this instance was at its minimum, great and at all times while the train was in motion so that in that at any moment it might increase or diminish from a half to three and a half feet or *vice versa* so that the plaintiff attempting to encompass it must be obvious to any circumventor prudent man. This danger was not lessened in this case because that the train to all appearances was about to stop because of stopping itself increased the chances that the relative position of the cars would be suddenly changed, and inasmuch as one car at rest fills the requirements of the statute in this respect, the train might have come to a full stop and again got in motion—fact which almost necessarily involved a lengthening or shortening of the distance between the cars—while the plaintiff was in the act of stepping from one to the other car. The distance being in all circumstances considerable and uncertain with the plaintiff under the particular circumstances of its being suddenly increased or diminished, we hold that the plaintiff did an extremely dangerous thing in attempting, while the train was in motion, to pass from the open to the close car by means which were not provided for or adapted to the use he sought to make of them; and that this negligence on his part proximately contributed to his injury. He, therefore, had no cause of action even conceding that there was evidence tending to show negligent conduct on the part of the defendant, of which he would have had a right to complain if it were his own fault, as to which we are not to be understood as expressing any opinion. Plaintiff's case could not have been aided by the fact of a custom on the part of passengers on these trains to do a previously dangerous thing which he attempted. *Warden v. Nashville R. R. Co.*, 94 Ala. 277. Nor was it at all prejudicial to the plaintiff that the parol evidence admitted against his objection as to the existence of a rule of the defendant company forbidding passengers to pass from one car to another while trains are in motion.

We find no error in the record and the judgment of the court is affirmed.

WOOD v. RICHMOND & DANVILLE RAILROAD COMPANY.

Supreme Court, Alabama, November Term, 1892.

[Reported in 100 Ala. 660.]

INJURED AT STATION—OBSTRUCTION ON PLATFORM—CONTRIBUTORY NEGLIGENCE.—Where there were pieces of lumber and cross-ties partly obstructing a station platform, but there was room for passengers to pass safely, and plaintiff knew of the obstruction, but in attempting to reach a train he stumbled over the same and was injured, it was held that plaintiff was guilty of contributory negligence (1).

APPEAL from the Circuit Court of Jefferson. *Affirmed.*

Action by W. H. Wood against the Richmond and Danville Railroad Company to recover damages for personal injuries alleged to have been suffered by reason of the defendant's negligence. There was judgment for the defendant, and plaintiff appeals.

1. **MEMPHIS & CHARLESTON R. CO. v. COPELAND**, 61 Ala. 376 (1878), action by Lizzie Copeland, as administratrix of Alexander Copeland against the railroad company for damages for the negligent killing of her intestate. It appeared that Copeland was a passenger on one of defendant's trains, and on arrival at his destination he alighted, but a long freight train blocked the track between the main line and the depot. After waiting a few minutes for the train to move, Copeland tried to crawl between the cars of the freight train, and the cars being suddenly backed, he was crushed and killed. There was a verdict for plaintiff for \$25,000. On appeal judgment was reversed, the court holding that the following part of the general charge should not be given, viz: "Or if you believe from the evidence that the freight train was standing still when the deceased got off the passenger train, and that the freight train was between the deceased and the depot, and that it blocked up the

crossings, so that the deceased could not cross, and that he was attempting to cross between the cars, and that the train started without giving the signal by blowing the whistle or ringing the bell, or by warning him to get away, then the plaintiff is entitled to recover such damages as the jury may think proper under the circumstances according to the evidence." It was also held that defendant's requests to charge should have been granted. "4. If the jury believe from the evidence, that at the time of the accident, defendant's freight train was standing on its track ready and about to move, and that Copeland wishing to go to the other side of it, got between the cars of the train for any purpose, and not being seen by those in charge of the train, it was backed and Copeland run over and killed, then the jury must find for the defendant. 10. If the jury believe the evidence they will find for defendant."

There was no substantial conflict in the evidence in this case and the facts are sufficiently shown in the opinion.

Upon the hearing of all the evidence, the court, at the request of the defendant, gave the following written charge: "If the jury believe the evidence they must find for the defendant."

JOHN S. JEMISON, for appellant.

JAMES WEATHERLY, for appellee.

Coleman, J. — The plaintiff, Wood, sued to recover damages for personal injuries. There is no substantial conflict in the evidence and we are of opinion that the defendant was guilty of negligence averred in the complaint. The main question is as to whether the plaintiff was guilty of contributory negligence. The facts are that about 6 o'clock P. M., October 4, 1890, plaintiff arrived at City to take passage on defendant's road for Birmingham; that he purchased a first-class ticket; that the train was delayed until about 1 o'clock A. M.; that the route from the station house to the train was over a platform prepared by the defendant for the use of passengers; that there were pieces of lumber and cross-ties on the platform obstructing in part the passageway; that there was room sufficient for passengers on the platform between the pile of lumber and the edge of the platform; that it was dark, and defendant had no lights, and that in attempting to reach the train at the place where passengers were accustomed to board the train, he stumbled over the obstruction and was injured. There was other evidence tending to show the same facts. Plaintiff himself testified that he had seen the lumber and obstruction on the platform, and knew its location, but testified that at the time he stumbled upon the obstruction he did not recollect the fact that he had seen the timbers there the evening before." The passenger train had been standing some time on the side track, near the station and convenient to it, waiting for a freight train moved out from the depot on the main track. It does not appear to have been any emergency for unusual haste, as we have said, the defendant was guilty of negligence in failing to have the passageway cleared of obstructions, or having sufficient light to enable the passengers to see the obstructions. It does not appear that there was any difficulty in passing along the platform by one who knew of the obstruction, if he was at all careful. Inattention, thoughtlessness, forgetfulness, or in the language of the plaintiff, that at the time "he did not recollect having seen the timbers there the evening before" constitute such contributory negligence *per se*, as to justify the giving of the affirmative charge to the court for the defendant? In the case of L. & N. R.

Hall, 87 Ala. 708, in reference to an employee suing the road, the court uses this language: "On the other hand if he has been sufficiently warned or notified, and from inattention, indifference, absent-mindedness, or forgetfulness, he fails to inform himself, or fails to take the necessary steps to avoid the injury, this is negligence and he should not recover. Citing many authorities to the proposition. The facts of the case of the A. G. S. R. R. Co. v. Arnold, 84 Ala. 159, in some respects were similar to the one now under consideration. The station house or ticket office was upon an elevated platform. The descent from the platform was by means of a narrow stairway. Arnold was familiar with the way of descent and was "cautioned to look out for the steps." It was dark and there were no lights, and plaintiff did not call for lights. As he attempted to descend to board the train he deflected too far to the right, missed the steps, and fell and was injured. Arnold's fall was not occasioned by forgetfulness, or absentmindedness. His purpose was to descend the steps but missed them. The court held, though not unanimously, that, under the circumstances of the case, the question of contributory negligence was a fact to be determined by the jury. The difference between that case and the one at bar is this, in the former the injured party had in mind the difficulty of the descent, and according to his testimony was endeavoring to descend by the stepway but mistook its exact location. In the case at bar no lights were called for, there was no thought of the obstruction, and heedlessly or from forgetfulness, the plaintiff stumbled and fell. We think his own testimony shows that he was guilty of contributory negligence. We can not foresee the result if it be once admitted that mere forgetfulness, or inattention, can excuse negligence.

We find no error in the record, and the judgment must be affirmed.

**MEMPHIS & LITTLE ROCK RAILWAY
v. SALINGER (ADMINISTRATOR).
SALINGER (ADMINISTRATOR) v. MEMPHIS &
LITTLE ROCK RAILWAY.**

Supreme Court, Arkansas, November Term, 1885.

[Reported in 46 Ark. 528.]

**RIDING ON PLATFORM—TRAIN FALLING THROUGH BRIDGE
—DEATH OF PASSENGERS.**—Where plaintiffs' intestates went upon the platform of a train for the purpose of smoking cigars, although warned by the brakeman and conductor that it was dangerous to ride there, and while on the platform some of the cars of the train, including that on which the plaintiffs' intestates, broke through a bridge and plaintiffs' intestates were killed, but none of the other passengers were killed or seriously injured, it was held that the verdict for plaintiff was not supported by sufficient evidence, the facts showing contributory negligence on the part of the deceased.

CONTRIBUTORY NEGLIGENCE.—It is contributory negligence for a passenger to remain on the platform of a car propelled by steam, when there is no reasonable excuse for so doing, and after he has been specifically warned of his danger.

APPEALS from St. Francis Circuit and from Pulaski Circuit Courts. The facts appear in the opinion. *Reversed.*

CLARK & WILLIAMS, for **SALINGER**, administrator.

U. M. & G. B. ROSE, for the Railroad Company.

Smith, J.—These two cases were decided on substantially the same facts. Both were actions for damages, brought by personal representatives, for the negligent killing of their intestates, who were passengers on a train operated by Sibley as receiver. The answers denied negligence and averred that the deceased had met death by their own negligence in voluntarily and unnecessarily occupying a position upon the platform while the train was running. In the case last above mentioned, the jury, under the instructions of the court, found the issue for the defendants. In the other case, the plaintiff recovered judgment for \$2,500.

Salinger and Goldberg were travelling on the west-bound train from Memphis and occupied seats in the ladies' coach until they reached Forrest City, the supper station. After that, they went out upon the platform to smoke. They were warned by the brakeman and also by the conductor that it was dangerous to ride there, but replied that they would go inside as soon as they had finished their

cigars. About four miles west of Forrest City was a bridge or trestle. The engine and tender passed over safely, but the express, baggage, smoking and emigrant cars broke through the bridge and turned over either completely or partially. One hundred and eight passengers were aboard, of whom, as it appears, none were killed or even seriously injured, except Salinger and Goldberg, who were standing on the platform between the ladies' car and the emigrant car, and Adair, who was in the baggage car. The seating capacity of the passenger coaches in the train, exclusive of the sleeper, was one hundred and fifty. The front trucks of the ladies' car left the track, but the car did not turn over. The sleeping car in the rear did not run off.

The following are the only directions that are complained of here in Salinger's case:

Third—"One who is injured by the negligence of another cannot recover any compensation for the injury if he, by his own ordinary negligence or willful wrong, materially contributes to produce the injury of which he complains, so that but for his concurring fault the injury would not have happened to him."

Sixth—"If the jury find that the defendant had attached to its train any suitable passenger car, and had assigned the plaintiff's intestate a seat therein, and that there was room for him in such car, and that he voluntarily went upon the platform, and while there was advised by the officers in charge of the train to go into the car, but neglected to do so, and was killed in that position, and that no one in the car assigned to him was injured, they will find that the negligence of the plaintiff directly contributed to the injury, and will find for the defendant."

Seventh—"If at the time of the accident the deceased was voluntarily and unnecessarily on the platform (that is, if there was room inside the car for deceased), this constitutes such contributory negligence as would prevent a recovery."

In the case of Goldberg, the motion for a new trial alleged that the verdict was contrary both to the evidence and instructions; and also error in the charge of the court, and in its refusal to charge as requested.

That portion of the charge which was excepted to follows:

Second—"It is not controverted that when the deceased, Goldberg, was killed he was riding on the front platform of the ladies' or first-class car; but the question, whether so being on the platform was contributory negligence in such manner as to defeat his right of recovery depends upon circumstances, and is a question for

the jury; and, in determining this question, the court instructs the jury as follows:

"That the deceased, having a first-class ticket, had a right to be in his seat in the first-class car, or in the second-class car, or, for the purpose of smoking, in the smoking car, and if injured in either of such positions by the defendant's negligence he would have a right to recover. The question is whether standing upon the platform was a more dangerous position, and enhanced the defendant's risk for his life and safety over and above the risk if he had been in any of the places where he had such right to ride.

"The deceased, by taking a position on the platform, assumed the risk of such additional damages only as were naturally incident to such a position and such as a prudent man would have foreseen. If the event by which the deceased lost his life was in its nature such as endangered all parts of the train alike, and was as likely to have injured the deceased had he been in other places where he had the right to be as on the platform, then the being upon the platform did not contribute to the injury."

Third—"The question whether the standing upon the platform was more dangerous than in the cars must be determined by the nature of the accident which caused the injury, not by reference to any other accident which might have been expected to happen.

"It must be determined by the question whether a prudent man, in anticipation of such an accident, would have regarded and avoided the platform as a position where he would have been more likely to be injured than if in his seat in the cars; and if the jury believe that the nature of the accident was such as to threaten all positions in the cars alike, or that it threatened no more danger to one standing upon the platform than to one in the cars, then the jury will find that the deceased was not guilty of contributory negligence, notwithstanding they may believe he was warned not to stand there, and notwithstanding it appeared after the happening of the event that he would not have been injured in the car."

The defendants asked the following instruction:

Fifth—"There are portions of every railroad train which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his reception, that his presence will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position. A passenger who voluntarily and unnecessarily rides upon the platform of a car cannot be said to be in the exercise of that discretion and caution which the law requires of all persons who are of full age, of sound mind and

ordinary intelligence; and if he suffers an injury in consequence of his occupying such a position, he cannot recover."

This the court modified so as to read as follows:

"A passenger who voluntarily and unnecessarily rides upon the platform of a car cannot be said to be in the exercise of that discretion and caution which the law requires of all persons who are of full age, of sound mind and ordinary intelligence."

The court also modified a direction prayed by the defendant, identical in language with No. 6 of the Salinger series above set out, so as to make it read thus:

"If the jury find that the defendant had attached to its train a suitable passenger car, and had assigned plaintiff's intestate a seat therein, and there was room for him in such car, and that he voluntarily went upon the platform, and while there was advised by the officers in charge of the train to go into the car, but neglected to do so, and was killed in that position, and that no one in the cars assigned to him was injured, this is a circumstance, which in connection with all the other facts and circumstances connected with the accident, the jury may consider in arriving at a conclusion as to whether the deceased was guilty of such negligence and want of prudence as contributed to his death; and if they find, in view of all the facts connected with this accident, that the death of plaintiff's intestate was due to the negligence of the defendants, and was contributed to by the negligence and want of care on the part of deceased in being on the platform instead of in the seat assigned him, they will find for defendants."

The court also refused a prayer of the defendants, the same in tenor and effect with No. 7, of the Salinger series, but gave a direction couched in the same language as No. 3, of that series; and also the following, at the instance of the defendant:

"To establish the liability of the defendant as a passenger carrier two things are requisite: That the defendant should be guilty of some negligence which mediately or immediately produced or enhanced the injury; and that the passenger should not have been guilty of any want of ordinary care and prudence which contributed to the injury. But the burden of proving contributory negligence is on the defendant."

The evidence was contradictory upon the points, whether the disaster to the train was due to the presence of rotten timbers in the bridge, and whether the defect was latent, or might have been discovered by the application of scientific tests. But the jury might well have resolved any doubts they may have had upon the subject

by finding that the accident was not inevitable, and that the receiver had not done his whole duty to the travelling public by keeping his road in thorough repair. And if the passengers, who lost their lives, had been seated in the compartments provided for their accommodation, there would have been an end of the cases.

But back of this lay another question—whether these persons had not themselves so far contributed to their misfortunes by their own want of ordinary caution, that, but for such negligence, they would have escaped unhurt. Now there is, and can be, no serious controversy that Salinger and Goldberg were, of their own choice and for their own pleasure, and not from necessity, standing upon the platform, at the time of the accident, after repeated warnings of their danger, and were killed in consequence of occupying the exposed position. And the jury in the Goldberg case, in order to reach their conclusion, must have ignored these facts, all of which are either conceded, or indisputably proved. Hence we have hesitation in saying that the verdict is not supported by sufficient evidence. For they have found the issue of contributory negligence directly contrary to what the facts are admitted to be.

The verdict is also contrary to the third and fourth directions given at the request of the defendants, and to the modification of the fifth and sixth. But the truth is the jury must have been misled by the confused and contradictory charge of the court. The second and third directions for the plaintiff are cloudy, tending to obscure a very plain matter. They seem to tell the jury that notwithstanding Goldberg may have been guilty of negligence which contributed to his death, yet they, by virtue of their omnipotence as triers of facts, might find otherwise, if they chose to disregard the evidence.

The instruction numbered 3, in both series, is taken from *Man & Redfield's work on Negligence*, sec. 25, and is applicable almost in any case where the cause of action is a negligent injury to the defense contributory negligence, and there is any testimony in support of the defense.

The fifth prayer for defendants in the Goldberg series was based upon the opinion of this court in *L. R. & F. S. Ry. Co. v. Atchafalaya*, 40 Ark. 322 (1). We perceive no objection to the prayer as legally framed. It is good law, pertinent to the case in hand and warranted by the state of the proofs. Still we should never render judgment which was righteous and just because the Circuit Court had refused an unobjectionable request and had substituted

1. See note of this case on page 54, *post*.

place a direction which conveyed the same general idea. The same thing may be said of the modification of the sixth prayer.

The seventh prayer as granted in the *Salinger* case should have been granted in the *Goldberg* case. It is contributory negligence for a passenger to remain on the platform of a car propelled by steam, when there is no reasonable excuse for so doing, and after he has been specifically warned of his danger. And if an injury happen to him under such circumstances, through the company's negligence, yet if it also appear that the injury would not have fallen on him but for his being in that particular position, the company may successfully defend against an action for such injury. *Wharton on Negligence*, sec. 364; *Beach on Cont. Neg.*, sec. 54; *Hickey v. B. & L. R. Co.*, 14 Allen, 429; *Camden & Atl. R. Co. v. Hoosey*, 99 Penn. St. 492; *Macon & Western R. Co. v. Johnson*, 38 Ga. 409; *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112 (1); *Quinn v. Ill. Cent. R. Co.*, 51 Ill. 495; *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202.

Contributory negligence is ordinarily a question of fact; but when the facts are not in dispute, the province of the jury is very much narrowed.

An action was brought in the Circuit Court of the United States for the eastern district of Arkansas, for the death of Adair, who was killed in the same wreck. The plaintiff was beaten upon the issue of contributory negligence, the proof showing that, for the purpose of smoking, he had gone into the baggage car, a place not intended for the reception of passengers, and was there when the train fell through the bridge.

The judgment of the Pulaski Circuit Court is affirmed, and the judgment of the St. Francis Circuit Court is reversed, and the cause remanded to be proceeded with in conformity to this opinion.

1. *Ala. Gt. So. R'y Co. v. Hawk*, 72 Ala. 112, is reported in 2 Am. Neg. Cas. 10.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY v. CAVENESSE.

Supreme Court, Arkansas, November Term, 1886.

[Reported in 48 Ark. 106.]

KILLED ON TRACK AT BAGGAGE PLATFORM.—Where a person had purchased tickets for passage on one of defendant's trains, and walked across the track to the baggage platform to hand a ticket to his son, and stopped between the baggage platform and the track for the purpose of making a memorandum, and while standing there, a train of defendant's came along, and the passenger stepped back against the platform to allow the train to pass and was struck and killed by the train, judgment for plaintiff was reversed for error (among other errors) in giving instruction which led the jury to believe that the railroad company was liable because its baggage platform was too near the track and that the deceased was not guilty of any negligence, under any state of facts, on account of being where he was at the time he was killed, there being no evidence that the railroad company had not kept in a safe condition all portions of its platforms and the approaches thereto (1).

APPEAL from Pulaski Circuit Court. The facts appear in the opinion. *Judgment reversed.*

J. M. MOORE, for appellant.

SOL. F. CLARK & SON, J. C. BARROW and SAM. W. WILLIAMS, for appellee.

Battle, J.—On the 2d of November, 1883, in the town of Argenta, in this State, Jonathan H. Cavenesse was killed by the loco-

1. In **ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y CO. v. FAIRBAIRN** 48 Ark. 491 (1886), the plaintiff below was injured by stepping into a cavity caused by a rotten plank in defendant's platform at Bierne station. The jury found for plaintiff and defendant appealed. The question whether plaintiff was lawfully on the platform was considered on appeal, and was in plaintiff's favor. The court (per Cockrill, Ch. J.) in its opinion, said: "In fixing the railway's obligations the statute requires that they shall post upon the nearest station-house a notice of the

killing of stock by their trains, and imposes a penalty to be recovered by the owner for its non-observance. This is for the benefit of the stockholder. If his cow is missing and he is informed that an animal has been killed upon the railroad track, he can get a description of it, with the time and place of the killing, from the notice the company is required to post, and is thus facilitated in making his claim for compensation. It is necessary that he should go upon the platform at the station for this purpose, and he has therefore the legal right to do so. With-

motive and cars of the Little Rock and Fort Smith Railway Company. His administratrix brought this action against the railroad company to recover the damages by reason of his death.

A terminus of the defendant's railroad is in Argenta. Its passenger platform, waiting-rooms and ticket office at this place are on the west side of its track, and its baggage platform is immediately opposite and on the east side. The passenger platform is spacious, twenty feet wide, and is on a level with the top of the rail. The baggage platform is three feet high, and three feet from the rail, so near that a car could not pass a man of the deceased's size standing between it and the railroad track. It is built on blocks and is open at the sides. There is an incline at the northwest and northeast corners of it for persons having business on it to go on or off. On the north of it the Memphis and Little Rock Railroad crosses the defendant's track. Within the southeast angle formed by the crossing of these two roads is the baggage platform of the defendant.

On the 2nd of November, 1888, the deceased arrived at Argenta

out this right the notice would be useless and would not have been required. In the case before us a cow had been killed on appellant's track. The owner was apprised of the fact and desired to examine the notice, which he knew was posted at the station, in order to get more accurate information. He was illiterate and unable to read. He procured the plaintiff to go with him to read the notice for him. The notice was posted on the wall of the station-house, and the plaintiff was compelled to mount a box to read it. When he stepped off the box his foot went through a hole in a decayed plank in the platform and he was injured. If the stock owner had been injured while properly exercising his right to examine the notice, through the want of ordinary care on the company's part, we think it clear that he could recover. He was there through the inducement or upon the invitation of the company implied from posting the notice for his information, and was entitled to safe access to his place of

business. 2 Woods Ry, sec. 310; *Carlton v. Franconia, I. & S. Co.*, 99 Mass. 216." Judgment affirmed.

In *RAILWAY COMPANY v. COX*, 60 Ark. 106 (1895), it appeared that plaintiff, on arriving at his destination in the night time, was temporarily detained by a freight train standing between his train and the depot, and that, on attempting to go around the freight train, he fell into a cattle gap, with the location of which he was acquainted, and was injured. The plaintiff recovered judgment for \$800, which, on appeal, was reversed. The court held that in the absence of any apparent necessity for him to go by that route, or of any invitation or inducement by the railway company to do so, he was guilty of such contributory negligence as would preclude a recovery, and this is true whether the night was dark or not. The court cited *Little Rock, etc., R. Co. v. Cavenesse*, 48 Ark. 106, 9 Am. Neg. Cas. 40, *ante*; *Texas, etc. R. Co. v. Orr*, 46 Ark. 182, 9 Am. Neg. Cas. 54, *post*.

on his way to Fayetteville. He had with him a minor son. The son took a seat upon the baggage platform, while his father went to the ticket office for the purpose of purchasing tickets of defendant to Fort Smith for himself and son. He purchased the tickets and walked across the track to the baggage platform, and handed one to his son, and stopped between the baggage platform and defendant's track for the purpose of making a memorandum in his book. While standing here, with his back partly to the railroad, a train of defendant, consisting of an engine and a tender and a caboose and cattle car, came backing down from the north side of and across the Memphis and Little Rock Railroad in the direction of deceased. He started across the track, but finding the train very near him, backed up against the baggage platform for it to pass. He was struck in that condition and killed by the train. Many witnesses testified that the train stopped the usual time before crossing the Memphis and Little Rock Railroad, and that the usual signals of its approach were given, while others testify to the reverse. All the employees on the train, except one, testified that they did not see him until after he was struck by the train. Witnesses differed as to the speed of the train at the time it struck him. Some testified it was running four or five miles an hour, and others from eight to twelve miles an hour.

Sherman Kirley testified in the trial that he was a brakeman on the train that killed the deceased; that the engine was turned forward, and was pushing the caboose and cattle car, and was running about ten or twelve miles an hour when it crossed the Memphis track; that the engineer blew the whistle before crossing, but did not stop; that the defendant was in the habit of sending men forward to flag its trains before crossing, but he did not know that there was a man there for that purpose at this time; that he was standing in the caboose door, about eight car lengths from Cavenesse, when he first saw him; that Cavenesse first tried to cross the track, but did not have time; that there was an employee on top of the train, but he (Kirley) did not know whether he saw Cavenesse or not; that he (Kirley) saw from Cavenesse's motion that he could not get out of the way; that he (Kirley) gave the signal to stop three times when about five car lengths from the deceased, but did not give the signal when he first saw him; that the engineer did not see the signal, but the fireman did; that the train did not check up; that Cavenesse was standing leaning against the baggage platform, talking to his son, who was sitting on the platform in front of him; that when Cavenesse saw the cars were going too fast for him to step across the track

he tried to dodge under the baggage platform, but could not, and then straightened himself and leaned against the platform, with his back to it; that the steps of the caboose struck him, threw him down, and the boxing of the trucks killed him; and that the train stopped after running about five car lengths after passing him.

A. G. Cavenesse testified as follows: "Am seventeen years old and son of deceased; was sitting on baggage platform, with legs hanging down. We were waiting for train. Deceased had bought tickets and came across track and handed one to me, then turned, with his back to me, and was making memorandum of money paid for tickets; back was partly to me and to the track. The train came rolling down pretty rapidly, about ten miles an hour. I hollowed to father, 'Look out.' He started to cross the track, but found the train was too close, and backed against platform. He was struck in that condition and killed. The train was within twenty or twenty-five feet when I first saw it. It was within fifteen feet of father when I called his attention to it; when he looked it was within eight or ten feet of him. The cars were even with him when he got back to platform. He could not have crossed the track. Two cars passed by him. The steps of the caboose caught him and rolled him along the edge of platform, there not being room for his body to pass. When he got to end of platform he dropped, with right leg across the rail, and engine and tender passed over it. No bell was rung or whistle blown until after engine passed him about twenty-five yards. A brakeman was on the end car; he saw father and signaled to the engineer to stop. It would not have done any good to stop then; the cars were too close. The cars were within twenty feet when brakeman saw him, and he signaled and went to brakes. Train did not check up any. It was going too fast to have been stopped. Don't know how close platform was to train, but too close for train to pass a man of his size. He weighed about two hundred pounds; was very large. He could have been seen from the train about two hundred yards up the road. The platform was the one right at the crossing of the Memphis and Little Rock Railroad, where baggage and passengers were put on and off both roads; good many people around, and good deal of noise—rattling of baggage, omnibuses, etc."

Sherman Kirley was allowed to testify, against the objection of defendant, that there had been strife between the employees of defendant and the Memphis and Little Rock Railroad Company before Cavenesse was killed, and a collision had occurred on account of it.

F. T. Mathews testified that he erected platforms for a railroad in

Louisville, and one at Texarkana for the Iron Mountain Railroad, and that the space between these platforms and the edge of the widest cars was fourteen inches. The defendant objected to this evidence because it was irrelevant. The court overruled the objection, and defendant excepted. Other witnesses testified, but it is unnecessary to state their testimony here.

The plaintiff asked the following instructions, which were given :

"2. It is a rule, as applicable to all cases of injury about stations, that railway companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort ; and all portions of their station grounds reasonably near to the platforms where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go.

"3. That it is the duty of a railroad company, when backing trains through her depot grounds, where she has invited persons seeking passage on her trains, and others having proper business with the company, to use the utmost care and caution, and to keep a thorough lookout ; and the running over such person by such train in such depot grounds in daylight, when such person may be easily seen, without seeing such person, is generally gross negligence on the part of the company."

The court gave the following instruction on its own motion :

"The plaintiff alleges that her intestate was killed by the negligent running of the defendant's train. The plaintiff asserts that defendant was guilty of 'negligence.' The defendant denies negligence, and claims that deceased's death was caused by his own contributory negligence. Negligence cannot be presumed, but must be proven by plaintiff, but if plaintiff has shown negligence on the part of defendant, and if defendant undertakes to be relieved by setting up 'contributory negligence' on the part of deceased, then defendant must show this 'contributory negligence.' When there is mutual 'negligence,' and the negligence of each the proximate cause of the injury, no action is sustainable.

"In determining whether an act is the proximate cause of an injury the legal test is :

"Was the injury of such a character as might reasonably, under the circumstances, have been foreseen or expected, as the natural result of the act complained of?

"The jury are the sole judges of the facts, the weight of evidence and the credibility of witnesses. You should, if possible, reconcile any conflict in the evidence, but if you cannot do this then give

credence to the witness or witnesses whom you believe most worthy of belief. When you find what the facts were, then apply the law as given you."

To the giving of each of said instructions defendant, at the time, excepted.

Defendant asked the following instructions:

"1. The jury cannot assume, from the fact of the killing of the deceased, that there was negligence on the part of the defendant. The burden of proving the facts alleged as negligence is on the plaintiff, and before you can find for the plaintiff it must appear from a preponderance of evidence that it was guilty of the alleged negligent acts.

"3. In considering the evidence greater weight should be given to affirmative evidence, by credible witnesses, of the ringing of a bell or the sounding of a whistle, than is given to the testimony of witnesses that they did not hear such signals, unless it is shown that they were listening for the signals, or that their attention was called to that circumstance.

"4. If the jury believe from the evidence that the train by which J. H. Cavenesse was killed, was moving at a prudent rate of speed; that a signal of the approach of the train was given by the ringing of the bell or sounding of the whistle; that the engineer or fireman did not see him in time to have stopped the train and prevented the injury, or if they did see him that there was nothing in his appearance to indicate any inability to get out of the way of the train, they will find for the defendant.

"5. If they believe that the deceased stopped on or by the side of the track, and between it and the baggage platform, in the way of the train (*and in a position that a prudent man should not have stopped*), and that there was no obstruction for some distance in the direction from which the train was approaching to prevent him from seeing it; that the employees in charge of the train did not keep a proper lookout, or see him in time to have stopped the train or prevented the injury, then his death was caused by his contributory negligence, and the jury should find a verdict for the defendant, notwithstanding they may further believe from the evidence that the employees in charge of the train in question neglected to ring the bell or sound the whistle for the crossing, and that the train was running at too great a rate of speed.

"6. If they believe that the employees in charge of the train neglected to keep a proper lookout, and thereby failed to see the deceased, J. H. Cavenesse; that the train was running at an impru-

dent rate of speed, and there was a failure to ring the bell or sound the whistle at the crossing; that the deceased had stopped on or by the side of the track in the way of the train (*and at a place where, under the circumstances, a prudent man, having due regard for his safety, would not have stopped*); that the track was open and he could have seen the train approaching for some distance, and in time to have gotten off the track, then he was guilty of contributory negligence, and the defendant is not liable, notwithstanding the negligence of his employees, and your verdict should be for the defendant.

"7. The law does not require railroad companies to station men at their depots for the purpose of keeping passengers off the tracks or warning them of the approach of trains, except it be at crowded depots in cities where there are numerous tracks.

"9. If the facts and circumstances in evidence in this case show that the deceased, at the time of the killing, was in a dangerous position, and was where a prudent man would not have stopped under the circumstances, and that this fact directly contributed to his death, then the plaintiff will not be entitled to a verdict on account of any negligence on the part of defendant's employees, unless the employees in charge of the train saw the danger deceased was in in time to have prevented the accident, and neglected to use all efforts in their power to avert the danger."

The court gave the first, third and fourth instructions. It refused to give the ninth instruction. It modified the fifth and sixth instructions, by adding the portion of said instructions in italics. And to the refusal to give the ninth, and the modifications of the fifth and sixth instructions, the defendant excepted.

During the closing argument before the jury, one of the attorneys for plaintiff made the following statement to the jury:

"I was the attorney for the defendant at the time Cavenesse was killed, and had been for eleven years, and I went with Col. Hartman, at the time the superintendent of the road, and investigated the case and advised him, Col. Hartman, at the time, that it was the worst case to defend that had occurred on the road."

Here the court, on its own motion, admonished the attorney that such a statement was improper, was not evidence, and told the jury that they should entirely disregard the same. Defendant's counsel also objected and excepted to the statement, whereupon plaintiff's attorney stated to the jury that his statement was not evidence, but was only made by way of argument, and that the jury would not consider it in any other light.

The jury returned a verdict in favor of plaintiff for five thousand dollars; and a judgment was rendered accordingly.

Defendant filed a motion for new trial, on the following grounds:

1. Error in giving the instructions asked by plaintiff.
2. Error in the instructions given by the court on its own motion.
3. In refusing the instructions asked by defendant, and in modifying defendant's instructions.
4. In refusing to exclude that part of Sherman Kirley's evidence objected to by defendant.
5. In admitting the evidence of F. T. Mathews as to the construction of the depot platform at Texarkana and on the V., M. & P. Railway, in Louisiana.
6. Verdict contrary to law and evidence.
7. Verdict excessive.
8. By reason of the statement made by plaintiff's attorney in his argument to the jury.

This motion was overruled, and the defendant filed a bill of exceptions and appealed.

It has been repeatedly held by this court, that "One who is injured by mere negligence of another cannot recover at law or equity any compensation for his injury, if he, by his own or his agent's ordinary negligence of willful wrong, contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault, the injury would not have happened to him, except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." *St. L., I. M. & S. Ry. Co. v. Freeman*, 36 Ark. 41; *Harvey v. Rose*, 26 Ark. 3; *Little Rock & Fort Smith Ry. Co. v. Parkhurst*, 36 Ark. 377; *Bauer v. St. L., I. M. & S. Ry. Co.*, 46 Ark. 388; *St. L., I. M. & S. Ry. Co. v. Wilkerson*, 46 Ark. 513.

"One who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence, also, in the same connection, the result depends upon the facts. The question in such cases is: First—whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, Second—whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case the

plaintiff is entitled to recover. In the latter case he is not." *Railroad Co. v. Jones*, 95 U. S. 439; *Bauer v. St. L., I. M. & S. Ry. Co.*, *supra*.

Carriers of passengers are liable for negligence, but are not insurers of the safety of their passengers, as they are of goods, at common law. They are required to exercise a great degree of care and diligence in taking care of their passengers. It is their duty to keep their stations, and the approaches thereto, in such condition that those who have occasion to use these premises for the purposes for which they are designated, may do so with safety. It is their duty to provide safe and convenient means of entrance to and departure from their trains. But while these duties rest upon the carrier it is the duty of the passenger to exercise ordinary care and prudence in taking care of himself and avoiding injury; and although the carrier be guilty of negligence, still, if the passenger by his own misconduct in failing to exercise ordinary prudence, directly contributes to the injury, he cannot recover. The duty of the carrier to keep its stations and approaches thereto in good condition and to provide safe and convenient means of entrance and departure, creates the reciprocal duty on the part of the passenger to occupy the premises provided for their use while waiting for trains, and in going to and from the carrier's depot, offices, platforms and trains, to use the ways and means provided for that purpose. *Gonzales v. N. Y. & H. R. R. Co.*, 50 How. Pr. 216 (1); *Mayo v. Boston & Maine Railroad*, 104 Mass. 137(2); *Wheelock v. Boston & Albany R. R. Co.*, 105 Mass. 203; *Thompson on Carriers of Passengers*, 233; *Jeffersonville Ry. Co. v. Hendricks*, 26 Ind. 228 (3); *Beach on Contributory Negligence*, 155.

In *Pennsylvania R.R. Co. v. Zebe*, 33 Penn. St. 326 (4), Mr. Justice Thompson, in delivering the opinion of the court, said: "The law implies in the contract of carrying passengers by railroad companies, that they shall provide a safe and sufficient road and cars, competent and careful conductors and hands, and safe and convenient means of egress and ingress to and from the line of their road. There must be no negligence on their part. There is also on the part of the

1. See the *Gonzales* case in 5 Am. Neg. Cas. 114, 119.

2. *Mayo v. Boston & Maine R. R.*, 104 Mass. 137, is reported in 3 Am. Neg. Cas. 773.

3. *Jeffersonville R'y Co. v. Hendricks*, 26 Ind. 228, is reported in 3

Am. Neg. Cas. 70. See also same case, 41 Ind. 48, 3 Am. Neg. Cas. 106.

4. *Penn. R. Co. v. Zebe*, 33 Pa. St. 318, 326, is reported in 6 Am. Neg. Cas. 232. See also same case, 37 Pa. St. 420, 6 Am. Neg. Cas. 243.

passenger an implied contract that he will and does 'assent to all the company's reasonable rules and regulations for entering, occupying and leaving their cars; and if injury befall him by reason of his disregard of regulations which are necessary to the conducting of the business, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief.' *Sullivan v. Philadelphia & Reading R. R. Co.*, 6 Casey, 234, per Woodward, J. Here are reciprocal duties defined, resting upon principles most reasonable and of the clearest justice, and nothing but special circumstances, or the most pressing exigencies, which are not now foreseen, could justify a departure from them. Nothing of the kind marked the case in hand. But the court submitted the question to the jury, whether the parties in this case had not a right to leave the cars, either by the safe means provided by the company, or by a way not provided. The abstract question of their right to do so is one thing, and need not be disputed; but the liability of the company by reason of their doing so is quite another thing. The regulation of the company for leaving the cars by the platform was apparent from its existence, and having been placed there and used for the purpose. This was the usual egress from the train. Without proof of any necessity, coupled with the proposition of their right to leave the cars at either side, the jury were, by the instruction of the court, allowed to find on the opposite of the principle laid down in the case of *Sullivan v. Philadelphia & Reading R. R. Co.*, which declares that passengers are bound to conform to the regulations of the company on entering, occupying and leaving the cars. The duty being fixed by the relation of the parties to each other, the contract must be performed by both. A departure by either could be justified only by a paramount necessity. The question then for the jury should have been, first, as to the performance of the duty by the company in providing safe cars and safe means of egress from them; and, secondly, if this were so, was it the fault of the company that the injury occurred? and to establish this, more was necessary to be proven than that the plaintiff and the injured son voluntarily chose to depart from the cars by an unusual way. There should have been proof of some existing necessity for their doing so, to excuse them from negligence and the consequences of it. Then, the question might have been left to the jury, as to the propriety of their violating the regulations of the company. A voluntary disregard of regulations providing for their safe exit by the platform was a disregard of their obligations to the company; and if it were so, the plaintiffs ought not to recover. We hold, on

these principles, that the company's liability could not be fixed for the injury consequent on a choice of the passenger in disregard of the provisions made by them for his safety and convenience. It was, we think, error in the court to submit the question of the rights of the parties to leave the cars at either side, in the absence of the proof of a justifying necessity in doing so. It was not negligence on the part of the company that they did not by force or barriers prevent the parties from leaving at the wrong side. People are not to be treated like cattle; they are presumed to act reasonably in all given contingencies, and the company have no reason to expect anything else in this case."

In *Bancroft v. Boston & Worcester Railroad Co.*, 97 Mass. 275 (1), the facts were, that the plaintiff's intestate alighted from the defendant's car upon the platform at the usual stopping place. There were two parallel tracks at this station, lying in a deep cut. There were two stairways provided by the company, by which the highway above could be reached *without crossing the tracks*, but the most obvious way—which was neither of these—was to cross both tracks to a platform on the other side, and go up to the stairs which were in full view upon that side. This was the customary mode of exit, and was a fact known to the defendants. The last time this passenger was at the station it was the only means of reaching the highway, and he had no notice of any other way at this time. He walked to the rear of the train upon which he had come in, and which now began to move towards Boston, and crossed the track upon which the train was running. On coming up to the next track he could only see the track clear towards Boston, for a distance of eighty or one hundred feet, on account of a curve and bridges across the track. As he attempted to cross the second track, an outward-bound express train, going at the rate of forty feet a second, and giving no signal of warning, rushed upon him before he could get across the track. This train he saw when too late, and, throwing up his hands, made an ineffectual attempt to escape, but was fatally injured. The court held that the plaintiff was not in the exercise of due care. Chief Justice Bigelow, in delivering the opinion of the court, said: "The track of a railroad, over which frequent trains are passing, is a place of danger. A person who goes upon it unnecessarily, or without valid cause, voluntarily incurs a risk, for the consequences of which he cannot hold other persons responsible—

1. *Bancroft v. Boston & W. R. R. Co.* 97 Mass. 275, is reported in 3 Am. Neg. Cas. 765.

certainly not without adequate proof that he took active measures of precaution to guard against accident."

But the contributory negligence of a plaintiff is no defense where the direct cause of the injury complained of is the omission of the defendant, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences thereof. It was held by this court in *St. L., I. M. & S. Ry. Co. v. Wilkerson*, *supra*, that the railroad company was liable for damages caused by the killing of a trespasser on its track, because, by the use of a proper degree of care, after it discovered him drunk on its track and unable to get off, it could have avoided killing him and failed to do so.

The burden of proving contributory negligence, as a general rule, is on the defendant. This rule is founded on the presumption that a person is careful until the contrary appears. It follows, then, that the reason of the rule ceases, and it can have no application when the plaintiff, by his own evidence, shows negligence on his part, and that such negligence aided or contributed to the injury received. By such evidence he establishes a defense to his own action, as much as if the same facts were proved by the defendant. *Shearman and Redfield on Negligence*, secs. 43, 45.

The second instruction asked by plaintiff, and given by the court, should not have been given. There was no evidence that appellant had not kept in a safe condition all portions of its platforms and the approaches thereto. It was calculated to mislead the jury, by leading them to believe that appellant was liable for damages caused by the killing of Cavenesse, because its baggage platform was too near the railroad track, and that Cavenesse was not guilty of any negligence, under any state of facts, on account of being where he was at the time he was killed.

The ninth instruction asked for by appellant should have been given. But appellant was not prejudiced by the refusal of the court to give it, because the substance of it was comprehended in instructions which were given.

The evidence objected to by appellant was clearly incompetent.

Appellant contends that the statement made by plaintiff's attorney, in his closing argument before the jury, was a good ground for a new trial, and the judgment of the court below should be reversed on account of it. It has been frequently held to be the duty of *nisi prius* courts to grant new trials, both in civil and criminal cases, where counsel abuse their privileges by persisting in stating to the jury facts which are not in evidence, or by making other statements

in the way of argument, which are clearly unwarranted and prejudicial. *Brown v. Swineford*, 44 Wis., 282; *Coble v. Coble*, 79 N. C. 589; *Tucker v. Henniker*, 41 N. H. 317; *State v. Smith*, 75 N. C. 306; *Ferguson v. State*, 49 Ind. 33.

In *Brown v. Swineford*, *supra*, Chief Justice Ryan, in delivering the opinion of the court, said:

"The profession of the law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at the best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him, but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels outside of his client's case and assumes to supply its deficiencies. Therefore is it that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudice against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, *de hors* the very case he has to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts, in jury trials, to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court."

But the court in this case admonished the attorney that the statement made by him was improper, and told the jury that they should entirely disregard it, and the attorney himself having said to the jury that his statement was not evidence, but was only made by way of argument, and that they should not consider it in any other light, it is presumed that the mischief of the remark was counteracted, and that appellant was not prejudiced thereby. Under the circumstances it is no ground for reversal. *Goldman v. Wolf*, 6 Mo. App. 490; *State v. Degonia*, 69 Mo. 485; *Fry v. Bennett*, 3 Bosw. 24.

For the errors indicated the judgment of the court below is reversed, and the cause is remanded, with instruction to the court to grant appellant a new trial.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. SWEET.

Supreme Court, Arkansas, February, 1893.

[Reported in 57 Ark. 287.]

PASSENGER KILLED IN DERAILMENT OF TRAIN—FUNERAL EXPENSES—IMPROPER EVIDENCE.—In an action to recover damages for the death of plaintiff's intestate, who was killed by the derailment and overturning of the caboose car on which he was riding as a passenger, it was improper to allow the widow to testify that neither she nor the railroad company had paid for the casket in which deceased was buried, as the action being brought for the benefit of the widow and next of kin the funeral expenses were not an element of damages in the case.

DUTY OF RAILROAD COMPANY—INSTRUCTION.—An instruction that if defendant received the plaintiff's intestate as a passenger it "was bound to the utmost diligence which human skill and foresight could effect" was erroneous, and did not apply in the case of a railroad operating a freight train with caboose attached for passengers (1).

Arkansas Midland R'y Co. v. Canman, 52 Ark. 517, 524-525, *applied*.

1. Among other actions in Arkansas relating to personal injuries sustained in derailment and overturning of cars, are the following:

GEORGE v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., 34 Ark. 613 (1879), was an action for damages for injuries sustained by plaintiff while riding as a passenger

on one of defendant's trains, which train ran off the track, and plaintiff was seriously injured in the head. Verdict for defendant. On appeal judgment was reversed on the ground of erroneous instructions. The court held that *prima facie* when a passenger, being carried on a train, is injured without fault of his own, there is a legal presump-

APPEAL from Desha Circuit Court, Watson District. *Judgment reversed.*

"Mrs. Ada H. Sweet, as administratrix of Frank Sweet, brought suit, in the Jefferson Circuit Court, against the St. Louis, Iron

tion of negligence, which the carrier must remove by proof. If a car is thrown from the track and crushed, and there is a broken rail, the jury may infer negligence from these facts; and the *onus probandi* will be shifted to the carrier. Railway carriers of passengers are bound to the utmost diligence which human skill and foresight can effect; and if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurs, the carrier is responsible.

LITTLE ROCK & FORT S. R'y Co., v. MILES, 40 Ark. 298 (1883), was an action for damages for injury sustained by plaintiff while a passenger on one of defendant's cars by reason of the car leaving the track, plaintiff being permanently injured by the fracture of his ribs and collar bone and contusions of the head. Plaintiff was a drover in charge of cattle. The defense was contributory negligence alleging that plaintiff was upon the top of the freight car and riding there without defendant's consent or knowledge of the conductor. There were three trials of the case. On the first plaintiff had a verdict for \$10,000; on the second, \$15,170, and on the third, \$4,000, which last was ordered to stand. On appeal judgment was reversed, the special verdict being inconsistent with the general verdict controlling and displacing the general verdict. Judgment should have been entered upon the special findings for defendant. The jury found on the special issues that plaintiff was rid-

ing on top of the cattle car when he was injured; that he rode there by the instruction of the station agent, *and by no other authority*; that a passenger car was attached to the train, on which he was at liberty to ride; and that if he had taken passage on it, and had remained there, except when called upon to look after his cattle, he would have escaped injury. [The Miles case is cited in Memphis, etc., R. Co. v. Salinger, 46 Ark. 528; Eureka Springs R'y v. Timmons, 51 Ark. 459]

IN TEXAS & ST. LOUIS RAILROAD Co. v. ORR, 46 Ark., 182 (1885), it appeared that plaintiff's intestate was a passenger on one of defendant's trains. On arrival at his destination he alighted from the train, and in order to reach the depot passengers walked along the roadbed and over a trestle which was within about fifty yards of the depot platform and open and unprotected. Plaintiff's intestate took this route and fell into the trestle and ditch, breaking his leg, and sustaining other injuries from which he shortly afterwards died. On the trial plaintiff recovered judgment for \$2,500, which on appeal, was affirmed. As a general rule railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platform, where passengers or those who have purchased tickets to take passage on the cars, or those debarking from them would naturally or ordinarily

Mountain and Southern Railway Company to recover damages to the widow and next of kin by the death of her intestate, who, while a passenger on defendant's road, was killed by the derailment and over-turning of the caboose car on which he was riding. The

be likely to go; and especially by those routes and methods which the company have established by its own customs and practice. [The Orr case is cited in *Railway Co. v. Cox*, 60 Ark. 106, 9 Am. Neg. Cas. 41, *ante*.]

IN *BUREKA SPRINGS RAILWAY v. TIMMONS*, 51 Ark. 459 (1888), it appeared that plaintiff was injured through the car, on which he was a passenger, leaving the track and turning over down an embankment, whereby he was injured in the hand, arm, thumb and leg. Plaintiff recovered judgment for \$1,000, which, on appeal, was affirmed. The fact that the car left the track was *prima facie* evidence of negligence. Railways are not insurers of passengers, but passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and if an injury occurs, by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible. [Citing *George v. St. L., I. M. & S. R'y Co.* 34 Ark. 613, 9 Am. Neg. Cas. 53, *ante*; *L. R. & F. S. R'y Co. v. Miles*, 40 Ark. 298, 9 Am. Neg. Cas. 54, *ante*.]

IN *ARKANSAS MIDLAND R'y Co. v. CANMAN*, 52 Ark. 517 (1889), it appeared that plaintiff was a passenger on a train composed of two box cars, a baggage car and two passenger coaches, the box and baggage cars being placed in front of the coaches. The train was not provided with brakes nor bell pulls, but was furnished with hand brakes and

two brakemen. Plaintiff was in one of the coaches. The train was running at the rate of about eight miles an hour, and had gone but a short distance, when the coach in which plaintiff was riding left the track, turned over, and severely injured him. On the trial there was a verdict and judgment for plaintiff which, on appeal, was reversed on the ground of erroneous instructions. The court held that an instruction that if the jury found "there was a spread or bent rail at the time and place of derailment," they might "infer negligence from that fact," and that the burden of disproving it was on defendant, was erroneous, as it assumed that any spread or bend in a rail is negligence, without regard to its sufficiency to cause the derailment, or otherwise impair the safety of a train. It was also held that while railway companies are bound to use all reasonable facilities for safe carriage of passengers, they are not required in order to make their roads perfectly safe to incur such expenses as would render the business of carrying passengers wholly impracticable.

IN *FORDYCE v. JACKSON*, 56 Ark. 594 (1892), the court, in its opinion (per COCKRILL, CH. J.) said: "The plaintiff was the messenger of the Southern Express Company engaged in conducting the express company's business on the line of the appellants' railway. The car provided by the railway for the use of the express company was derailed while the plaintiff was discharging his duties as express messenger, and he was injured in the

answer charged contributory negligence on the part of deceased.

"On May 26, 1891, the cause was transferred to the Desha Circuit Court, for the Watson district. At 2 o'clock P. M. on July 24, 1891,

wreck which followed. He recovered judgment for the personal injury, and it is argued by the appellants that his relation to the company does not warrant a recovery. It is true there was no express contract between the plaintiff and the railway company; but as the railway undertook to carry him, it was bound to use every reasonable precaution to carry him safely. He could recover, therefore, in tort, just as any passenger may, for the violation of this general duty. All the cases upon this and analogous questions are to that effect. *Thompson on Carriers*, p. 45, sec. 5; *Patterson's Railway Ac. Law*, sec. 222; 2 Wood, *Railway*, p. 1042 and n. 3; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Penn. Co. v. Woodworth*, 26 Ohio St. 585; *Brewer v. Railway*, 124 N. Y. 59; *Seybolt v. Ry.*, 95 id. 562; *Blair v. Ry.*, 66 id. 313; *Gulf, etc., Railway v. Wilson*, 15 S. W. Rep. (Tex.) 280. The testimony on behalf of the plaintiff tended to show that two causes conduced to the wreck, viz., a bull on the track and a rotten bridge.

"The undisputed facts were that a bull came upon the track near the bridge, the engine ran over the animal, the tender broke loose from the express car, the latter went through the bridge, and the plaintiff was injured by the fall of the car. Those facts establish a *prima facie* case for recovery in the plaintiff's favor, for the accident would not have happened ordinarily, had the track been safe and the train operated with care. *Seybolt v. Ry.*, 95 N. Y. 562; *Railway Co. v. Hopkins*, 54 Ark. 209; *St. Louis, etc. R. Co. v. Harper*, 44 Ark. 524." Judgment affirmed.

On motion for rehearing in *For-dyce v. Jackson*, the question of damages was discussed in which the court said: "The plaintiff had several ribs broken, a hip contused, his nose broken and disfigured, a permanent case of catarrh superinduced and the sense of smell impaired, as results of the injury—at least the jury could have found that state of facts from the testimony. We cannot adjudge that \$5,000 is an excessive award of damages for these injuries." Motion denied.

In *ST. LOUIS & SAN FRANCISCO R'y Co. v. MITCHELL*, 57 Ark. 418 (1893), *Mrs. Albert Mitchell* recovered judgment for \$2,250 against the railway company for injuries received while a passenger, by the derailment and overturning of the car on which she was riding, which judgment, on appeal, was affirmed. The mere fact of plaintiff being injured was not sufficient to presume negligence on part of defendant, but the derailment of the car, and the injury to the plaintiff thereby, raised a presumption which cast upon defendant the burden of proving that the same was not caused by any want of care on its part. In such a case the maxim "*Res Ipsa Loquitur*" applies. A railroad company is bound to furnish for its passengers a reasonably safe and sufficient track and equipments, and to maintain them in a reasonably safe condition, so far as can be provided by the utmost human skill, diligence and foresight, which is such skill, diligence and foresight as is exercised by a very cautious person under like circumstances. It is liable to a passenger for slight negligence causing injury.

the transcript and papers were filed in that court. On August 3, 1891, the circuit court to which transfer was made convened, and the cause was called for trial during the term. Defendant moved for a continuance upon the grounds, 1, that the transcript and papers had not been filed in the office of the clerk of Desha county more than ten days before the commencement of the term, and 2, that an important and material witness, J. G. McIlwain, was absent, who, if present, would swear that he was the conductor of the freight train upon which Frank Sweet was riding at the time that he received the injuries from which it is said he died; that said Sweet, at the time of the accident, was sitting in a chair, which was movable, in front of the open door of the caboose, with his feet resting in the door; that this was an unsafe and dangerous place to ride upon a moving train; and that an employee of defendant requested deceased, Sweet, not to sit in said door, at the same time informing him that the place in which he was then sitting was dangerous, and to move his chair back into the car, and away from the door, which deceased, Sweet, neglected to do; that if deceased, Sweet, had been sitting back in the caboose, he would not have been killed.

"The court overruled the first ground in the motion for a continuance. The second ground for a continuance was overruled upon plaintiff's agreeing that the witness if present would testify as stated.

"Mrs. Sweet was permitted, against defendant's objection, to testify that neither she nor the railway company had paid for the casket in which her intestate was buried; and that the undertaker had told her that he would look to her for it.

"A witness, McKennon, was permitted, over defendant's objection, to testify that the absent witness, McIlwain, had told him, after the accident, that, at the time the caboose turned over, Sweet was in the center of the car opposite the door.

"Plaintiff recalled T. B. Atkinson, who visited the wreck upon the engine which had come to Pine Bluff and returned with the surgeons. To quote the bill of exceptions verbatim: 'Q. When you went down to the wreck did you see Mr. McIlwain, the conductor? A. Yes, sir. Q. Did you see this brakeman, George Singleton, this yellow man? A. I would not state positively. I saw two or three brakemen, but I could not state positively that I saw him. Q. Did you make inquiry as to how this accident occurred? A. Well, we were all discussing the affairs, of course. Q. Did you ask the conductor anything about how it happened? A. I asked the engineer. Q. Was the conductor present at the time? A. I think not. Q. Did you hear George Singleton or McIlwain undertake to explain how

Sweet was sitting or standing, or how he got out of the car at the time of the accident? A. Well, I just heard some one of these train men remark that he undertook to jump out of the door of the car after the train began to tilt that way, and that was the last they saw of him until the thing was over. Q. When you say he, whom do you mean, 'he undertook to jump?' A. Mr. Sweet. Q. (By the court.) I am to understand that these train men and you were all standing there, and that you just heard some one of them make that remark? A. Yes, sir. Q. (By the court.) Nobody disputed it? A. No, sir."

"Here defendant, by attorneys, moved the court to exclude from the jury this evidence of witness Atkinson, which motion was by the court overruled, and the defendant company at the time excepted.

"The court, over defendant's objection, gave the following instructions asked by plaintiff, and referred to in the opinion, viz:

1. "If the jury find from the evidence that defendant railway received the plaintiff's intestate on one of its freight trains as a passenger, then it was bound to the highest practicable care and diligence to protect him from injury while he was such passenger."

2. "If the jury find from the evidence that defendant railway received plaintiff's intestate as a passenger on one of its trains, then it owed to him as such passenger, and was bound to the utmost diligence which human skill and foresight could effect. Any injury to him occasioned by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurred, would render the carrier liable for such injury."

"The jury returned a verdict for plaintiff for \$25,000, the full amount sued for. Defendant has appealed, and insists that the court erred in permitting the introduction of the testimony objected to and in giving the instructions quoted."

AUSTIN & TAYLOR and DODGE & JOHNSON, for appellant.

U. M. & G. B. ROSE, N. T. WHITE and WHITE & WOOLRIDGE, for appellee.

Hughes, J. — It was improper to allow Mrs. Sweet's testimony that neither she nor the railroad company had paid for the casket in which the body of the deceased was buried, as this action was not brought for the benefit of the estate of the deceased, and the evidence could have tended only to mislead or confuse the jury. The funeral expenses were not an element of damages in this case. The action was brought for the benefit of the widow and next of kin alone.

Section 6484 of Mansfield's Digest provides that, "in all cases of change of venue, the action shall stand for trial in the court to which the change is made, at the first term of the court which commences more than ten days from the filing of the papers of the case in the office of the clerk of such court."

The suit was begun December 11th, 1890. The change of venue was ordered May 26th, 1891. The court to which the venue was changed began August 3rd, 1891. The transcript and papers in the case were filed in the court to which the venue was changed July 24th, 1891—not ten days before the beginning of the term of the court. The Desha Circuit Court obtained jurisdiction of the cause by the filing of the transcript and papers in the case in that court. We are of the opinion that no error prejudicial to the appellant was committed by the court by proceeding to the trial of the cause at that term of the court. This court will not reverse a judgment for error that is not prejudicial. Section 5083 of Mansfield's Digest provides that "the court must, in every stage of action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The questions and answers thereto made by the witness, McKennon, in reference to a conversation had by him with McIlwain, the conductor of the train, sometime after the accident occurred, and which tended to contradict McIlwain by showing that he had made a different statement previously to the one set out as the statement he would make, if present, in the motion for continuance, were material, as they tend to bear upon the question of contributory negligence upon the part of the deceased. They were not proper because no foundation had been laid to warrant them for the purpose of contradicting McIlwain. The act of 21st February, 1887 (Acts 1887, sec. 1, p. 19), provides that "a motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit," etc. "Provided, the opposite party may controvert the statement so set forth in the said motion for continuance by evidence."

Our statutes, sections 2902 and 2903 of Mansfield's Digest, are, respectively, as follows:

"A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing that he has made statements different from his present testimony."

"Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of con-

cerning the same, with the circumstances of time and persons present, as correctly as the examining party can present them."

This was not done in this case, and the contradictory testimony was improper without it.

The court is of the opinion that the proviso in the above section of the act of 1887 was not intended to, and does not, dispense with the necessity for laying the proper foundation for contradicting a witness by first asking him whether he has made the statements testified to by the person by whom it is sought to contradict him and at the time and place indicated, thus affording him an opportunity to state what he said, and to explain what he meant by it. *Billings v. State*, 52 Ark. 308.

If it is desired to controvert statements of the application for continuance, it can be done by any proof showing that the statements are not true (without laying the foundation as indicated), other than evidence that the witness had made a different statement; but if it is sought to contradict the witness by proving that he has made a different statement, and thus impeach him and discredit his testimony, it cannot be done under the rules of the law until he has been afforded the opportunity above indicated. Justice and common fairness to the witness prohibit it, and the adjudicated cases so holding are numerous. *Conrad v. Griffey*, 16 How. (U. S.) 38, and cases cited. This applies as well to depositions as to oral examinations in court. *Unis v. Charlton's Admr.*, 12 Grattan, 484.

We think the statement of what the absent witness would swear, when it is admitted that he would swear what it states, should be treated as a deposition.

The testimony of T. B. Atkinson, when recalled by the plaintiff, as to statements made in his presence, sometime after the accident, by some of the railroad employees, was mere hearsay and clearly incompetent.

These statements by the railroad employees could not be taken as admissions by the railroad company. In *Railway v. Barger*, 52 Ark. 78, it is held that the statement of the depot agent as to the condition of the platform before the accident in that case was incompetent. The statement in this case was not a part of the *res gestæ*, and was not admissible as such, because it was not made at the time of the accident or so near to it as to throw light upon it. *Waldele v. N. Y. Cent. R. Co.*, 95 N. Y. 274; *Vicksburg & C. R. Co. v. O'Brien*, 119 U. S. 99.

The first and second instructions for the appellee were not correct. The objection to the first is that, as applied to this case, it

was not full enough. As to the second, the railroad company, in operating its freight train with caboose attached for passengers, was not bound to the "utmost diligence which human skill and foresight could effect," as set out in this instruction given for the appellee.

The law in this behalf, applicable to this case, is correctly laid down in the *Arkansas Midland Railway Company v. Canman*, 52 Ark. 524-5 (1), where it is said that "railroad companies are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers. While the law demands the utmost care for the safety of the passenger, it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expenses as would make their business wholly impracticable, and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger reasonably consistent with their business and appropriate to the means of conveyance employed by them, and to adopt the highest degree of practical care, diligence and skill that is consistent with the operating of their roads, and that will not render their use impracticable or inefficient for the intended purposes of the same."

There was no error in refusing the fourth prayer of the appellant. The law on the point covered by it was sufficiently given by other instructions. There was no error in the modification of this instruction by the court.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

1. See note of this case in notes to the case at bar on page 56, *ante*.

MAY v. HANSON.

Supreme Court, California, July Term, 1855.

[Reported in 5 Cal. 360.]

FERRYMEN—COMMON CARRIERS.—The law regards ferrymen as common carriers, and has imposed upon them the same duties and liabilities.

CARRIER OF PASSENGERS.—As soon as the ferryman signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery, and is chargeable with any accident occurring except by the act of God or the public enemy.

FERRYMEN—LIABILITY.—It is the duty of the ferryman to see that the teams are safely driven on board the boat, and if he thinks proper, he may drive himself, or unharness the team, or unload the wagon, to get them safely on board. But if the ferryman permits the party to drive himself, he constitutes him, *quoad hoc*, his agent, and is responsible for all accidents. And these rules apply to the delivery, as well as the receipt of goods and passengers.

INJURED AT FERRY LANDING—BURDEN OF PROOF.—In an action against a ferryman to recover for injuries sustained in driving off from his boat, it is not incumbent on the plaintiff to prove that he exercised ordinary care to avoid the injury, but the proof of the want of such care on the part of the plaintiff lies on the defendant.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County. *Judgment affirmed.*

Action for damages for injuries sustained by plaintiff in crossing defendant's ferry.

Defendant's counsel requested the court to charge the jury:

First—"That the plaintiff in passing over the ferry, and the landing and road therefrom, was bound to use prudence and caution and ordinary care, and if the jury believe from the testimony that at the time of the accident the plaintiff's wagon was defective, or that he drove or rode on the same carelessly, whereby the accident occurred, or either of these causes aided in producing it, then they must find for the defendant."

Second—"That the default of the defendant in not keeping the road in good repair at his landing, will not excuse the plaintiff from using ordinary skill and caution in passing thereover."

Third—"That the plaintiff must show to the satisfaction of the jury, that the action and injury, of which he complains, was caused by the negligence, fault or default of the defendant, in which he, the plaintiff, had no agency, and did not in any manner contribute,

and if he has failed by proof so to have shown, then they must find for the defendant."

The court refused the instruction and the defendant's counsel excepted.

The court charged the jury as follows: First—"A ferryman engaged in the transportation of passengers and goods for hire, is in law a common carrier, and as such, it is his duty to take care of them during their passage on the boat, and to have and provide good and safe landings for their ingress and egress."

Second—"That a distinction exists in the responsibility of the carrier of goods and the carrier of persons or passengers. The carrier of goods at common law stands in the situation of an insurer, and is responsible for every damage that may occur to the goods while they are in his custody, save and except such as are occasioned by the act of God or the public enemy. His entire faultlessness will not excuse him; thus he is liable for damages done by accidental fire or by robbery. It is a hard, inflexible rule of law, but resting, as the authorities say, upon principles of public policy and necessity, which it would be unsafe and unwise to disturb. The hardship of the rule, although in many cases it has apparently operated with very unjust severity, has never induced the court to relax its vigor."

Third—"The carrier of persons undertakes to exercise all human care and foresight, and is responsible for all accidents and injuries which might have been avoided and prevented by human care and foresight."

Fourth—"The defendant has urged that the injuries happened by the breaking down of the wagon; that at the time, the plaintiff himself was driving, and had control of the wagon and horses. Does this change the defendant's responsibility? I think not. A ferryman has the right, if he wishes to avoid accidents, to drive on and off his boat, all wagons and carriages. He may unload a wagon, if he thinks it too heavy, and take the goods and wagon on board separately. He has the right to provide how, and the mode and manner in which wagons loaded with goods and passengers, shall come on and go off his ferryboat. If he permits the owner to drive it on or off, he constitutes him, *quoad hoc*, his agent, and is responsible for all accidents that human care and foresight could have prevented."

Fifth—"The defendant further urges that the accident was the result of intrinsic defects in the wagon of the plaintiff; and that the injuries resulted from said defects, and not from any defects in the landing. If you think that the evidence in the case supports this

position, then plaintiff cannot recover; but if you believe that plaintiff's wagon would have carried the load which was on it, and himself, over an ordinary road, with safety and without injury, and that the condition of defendant's landing occasioned the accident, and that the same, by a reasonable effort and expense on the part of defendant, could have been improved, and the accident prevented, then defendant is liable for the damages resulting therefrom."

Sixth—"If the jury find for plaintiff, they should take into the estimate of damages the loss of plaintiff in consequence of the injury, the cost of surgical and medical attendance, his losses in time and property in consequence of the injury, so far only as they are shown in evidence to have resulted immediately from the injuries. But plaintiff cannot recover for the services of his wife and family in nursing him. Plaintiff is also entitled to recover for the injury to the limb and for his pain and suffering in consequence of the injury; but he cannot recover for any profits he might have derived from his business."

The defendant's counsel excepted to the first, third, fourth, fifth and sixth divisions of the charge and instructions.

The jury found for the plaintiff, and assessed the damages at \$8,300. The court overruled a motion for a new trial, and defendant appealed.

G. N. SWEZY, Z. MONTGOMERY and L. SANDERS, for appellant.

CHARLES LINDLEY, for respondent.

Murray, Ch. J.—The law regards ferrymen as common carriers, and has imposed upon them the same duties and liabilities. *Willis v. Jones*, 1 McCord, 105; *Cohen v. Hume*, Ibid. 440; *Rutherford v. McGowen*, 1 Nott & McCord, 17; *Fisher v. Crisbee*, 12 Ill. 344, and the cases there cited.

The principle deduced from these authorities is, that as soon as the ferryman signifies his assent or readiness to receive the passenger, that he becomes liable for his safe transit and delivery, and is chargeable with any accident occurring, except by act of God or the public enemy.

In two of these cases just cited, the accident occurred in driving into the flat or boat, and in both cases it was held to be the duty of the ferryman to see that the teams were safely driven on board of the boat. If, says the court, in those cases, the ferryman thinks proper, he may drive himself, or may unharness the team, or unload them, for the purpose of getting them safely on board. But if he permits

the party to drive himself, he constitutes him, *quoad hoc*, his agent, and is responsible for all accidents.

There can be no reason why this rule should not apply to the delivery, as well as to the receipt of goods or passengers.

A ferryman undertakes to safely transport passengers or freight from and to certain points, and from the moment that he receives until he has delivered his freight in a proper and safe manner, he will be liable. It is his duty to provide suitable boats and all the conveniences necessary for transportation.

By the sixteenth section of the Act regulating public ferries, it is made the duty of all ferry-keepers within this State to cause the banks of the river or creek to be dug sufficiently low, and kept in good passable order for the passage of man and horse, wagons, and other vehicles.

The duty and liability of the defendant being thus stated, it only remains to ascertain whether the present case comes within the rule laid down.

It appears from the evidence that the accident occurred by the breaking of the wagons, occasioned by a sudden pitch of the wheels from the apron of the boat, upon some rough logs, which were laid down as a track or road leading from the boat to the bank. Whether the accident was occasioned by the carelessness of the ferryman or driver, or on account of some latent defect in the wagon, was a question of fact, upon which there was conflicting testimony, which was submitted to the jury.

The law of the case was correctly stated in the instructions of the court below, and the defendant's instructions were properly refused. Much stress was laid in the argument upon the refusal of the court to give the third instruction asked for by the defendant. The instruction does not embody the true rule of the law, but on the contrary it is held that it is not incumbent on the plaintiff to prove the exercise by him of ordinary care to avoid the injury, but that the proof of want of it on the part of the plaintiff, lies on the defendant; that he who avers a fact in excuse of his own misfeasance, must prove it. *Beatty v. Gilmore*, 16 Pa. St. 463.

There was no error in allowing the plaintiff to introduce the ferry license after motion of non-suit; this was a matter within the direction of the court below, as we have often held before. There was no error in the court in offering terms to the defendant. Such practice is frequent in every State, and often serves to quiet litigation.

The allegation that the defendant was taken by surprise, is not

supported by the record. There is no affidavit of the fact, and nothing to show that he had employed that diligence to obtain the testimony of his witnesses which the law requires.

We are satisfied that this case has been fairly tried; that the law has been correctly laid down; and although the verdict may seem large, we have no power to interfere with it.

Judgment affirmed, with costs.

BOYCE V. CALIFORNIA STAGE COMPANY⁽¹⁾.

Supreme Court, California, July Term, 1864.

[Reported in 25 Cal. 460.]

OVERTURNING OF STAGE COACH—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.—In an action to recover damages for personal injuries occasioned by the overturn of a stage coach, it is only necessary for the plaintiff to prove the overturn and the injuries he sustained. The presumption of law is, that the overturn occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast on the defendant. In order to rebut the presumption of negligence, the defendant must show that the overturn was the result of inevitable casualty, or of some cause which human care and foresight could not prevent (2).

1. Cited in *Lawrence v. Green*, 70 Cal. 417, 9 Am. Neg. Cas. 68, *post*; *Bush v. Barnett*, 96 Cal. 202, 9 Am. Neg. Cas. 68, *post*; *Yeomans v. Contra Costa S. Nav. Co.*, 44 Cal. 71, 9 Am. Neg. Cas. 78, *post*; *Mitchell v. Southern Pac. Co.*, 87 Cal. 62, 9 Am. Neg. Cas. 85, *post*.

2. Among other actions in *California* relating to overturning of stage coaches are the following:

In *THORNE v. CALIFORNIA STAGE Co.*, 6 Cal. 232 (1856), the syllabus states the case as follows: "In an action for damages brought by a passenger against a stage company, for injuries to plaintiff, caused by carelessness of the driver in overturning the coach: *Held*, that the fact that the driver was informed before the accident, that a passenger was to be left at plaintiff's destination, and that after the accident the agent of defendant informed the

driver that plaintiff was to stop at the destination designated, was sufficient to establish *prima facie* the allegation in the complaint, of a contract to safely carry, etc.

"Evidence of the professional reputation of the physician who was employed by plaintiff to dress his wounds and effect a cure, is inadmissible, but it would be competent to prove that plaintiff's injuries were wholly or partially the result of improper treatment on the part of the physician.

"Where the evidence of plaintiff charged the accident to the want of proper care or skill of the driver, an instruction that defendants were liable for insufficiency of coaches, horses, or harness, is objectionable as irrelevant, but as it would work no injury to defendants, is not a sufficient cause to disturb a judgment for plaintiff." Verdict for

INSTRUCTIONS—DISCRETION OF COURT.—Counsel may propose instructions to the court, but the court is not compelled to give or refuse them as asked. If in the opinion of the judge the proposed instructions are defective in form of expression, or erroneous in law, he may modify them in either particular and give them to the jury in their modified form, or he may refuse them altogether.

PLEADING AND PRACTICE.—If in the progress of a trial evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, the error is waived, and the court may instruct the jury in relation to the whole field of inquiry covered by the evidence.

ERROR NOT PREJUDICIAL.—A judgment will not be reversed because an error has intervened in the course of a trial, which does not prejudice the defendant's case.

VERDICT—COMPUTATION.—A verdict which is arrived at by each one of the jurymen marking such sum as he thinks proper, and then adding the several sums together and dividing the total by twelve, and making the quotient the verdict, is not a chance verdict within the meaning of subdivision 2, of section 193, of the Practice Act.

IMPEACHING VERDICT.—The verdict of a jury cannot be impeached by the affidavits of the jurors, except when the verdict is arrived at by a resort to the determination of chance.

plaintiff for \$5,000, but judgment for \$3,000, the plaintiff filing consent to that amount. Judgment affirmed.

WARDROBE v. CALIFORNIA STAGE Co., 7 Cal. 118 (1857), was an action by plaintiff to recover damages for injuries sustained while a passenger on one of defendant's stage coaches. On the trial plaintiff recovered judgment for \$2,500. On appeal judgment was reversed, it being held that damages which are professedly laid for the benefit of the public cannot be recovered in an action brought by a passenger of a stage coach for injuries sustained by the upsetting of the coach. When it appears that the coach at the time of the accident was driven by the servant or agent of the owner, the rule in such cases is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him. (The verdict was for

actual and exemplary damages).

In **FAIRCHILD v. CALIFORNIA STAGE Co.**, 13 Cal. 599 (1859), plaintiff recovered judgment for \$2,250 for injuries sustained by her in the overturning of a stage coach in which she was a passenger. Defendant appealed on errors in giving and refusing instructions, but the judgment was affirmed. The court held that in suits against common carriers, damages for mental anguish are recoverable. Held also, that proprietors of stage coaches are not insurers or warrantors of the safety of passengers, to the same extent with common carriers of goods. But they are liable for the slightest neglect. They are held to extraordinary diligence and care. And, in case of injury the presumption, *prima facie* is, that it occurred by the negligence of the coachman. The *onus probandi* is on the pro-

DAMAGES.—In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice.

APPEAL from the District Court, Tenth Judicial District, Yuba County. The facts appear in the opinion. *Judgment affirmed.*

CHARLES E. FILKINS, for appellant.

W. C. BELCHER and **C. E. DELONG**, for respondent.

Sanderson, Ch. J.—This action was brought to recover damages on account of personal injuries sustained by the plaintiff by reason of the negligent and careless upsetting of the defendant's stage coach upon which he was a passenger. The damages were laid in the complaint at fifty thousand dollars, and the jury found a verdict in favor of the plaintiff for the sum of \$16,500. The defendant moved for a new trial, which was denied. The appeal is from the judgment and order.

The facts as gathered from the testimony contained in the record are substantially as follows: On the 19th of October, 1861, the

prietors to show no negligence, and that the injury was occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. Held also, that it is not error for a court to refuse an instruction asked, stating an abstract or general proposition of law, when it has already so charged the jury as to embrace such proposition, or so much of it as is applicable to the case. [Cited in *Lawrence v. Green*, 70 Cal. 417. See next case.]

LAWRENCE v. GREEN, 70 Cal. 417 (1886), was an action for damages for injuries sustained by the upsetting of a stage coach, in which plaintiff was a passenger. On the trial there was judgment for defendant which was reversed on the ground of erroneous instructions. The court held that the breaking of a wheel of the stage coach was *prima facie* evidence that the wheel was defective, and in the absence of evidence that the defect was latent, sufficient to establish negligence on the part

of the carrier. The burden was on defendant to show that the wheel was not defective, or if it was, that the defect did not cause the accident. [Citing *Boyce v. Cal. Stage Co.*, 25 Cal. 468, 9 Am. Neg. Cas. 66, *ante*, and *Fairchild v. Cal. Stage Co.* 13 Cal. 599, 9 Am. Neg. Cas. 67, *ante*.]

KERRIGAN v. SOUTHERN PAC. R. R. Co., 81 Cal. 248 (1889), was an action for injuries sustained by plaintiff by the upsetting of a stage coach. Plaintiff was nonsuited on the ground of contract expressly limiting liability of defendant over connecting lines of railway.

In **BUSH v. BARNETT**, 96 Cal. 202 (1892), plaintiff was injured in the upsetting of a stage coach in which she was a passenger. She recovered judgment for \$900 which on appeal was affirmed. The rule as to burden of proof as stated in *Boyce v. Cal. Stage Co.*, 25 Cal. 460, 9 Am. Neg. Cas. 66, *ante*; *Lawrence v. Green*, 70 Cal. 417, *supra*.

respondent paid the usual fare and took passage in one of defendant's coaches, to be conveyed from Downieville, in Sierra county, to Marysville, in Yuba county. He took a seat on the outside with the driver. The coach started soon after midnight. The moon was near its full, and the night clear and bright. About two o'clock in the morning, the coach was slowly ascending Goodyear's Bar Hill, and was about a mile from the summit. At that point the road curves around a very steep, rocky ravine. The roadway was constructed by digging into the bank on the upper or right hand side, and building a rock crib about eleven feet in height on the lower side and filling in with rock and earth. A log, about eighteen inches in diameter was placed on the edge of the rock crib or wall, and was a little higher than the road. The road was wide enough for the convenient passage of a coach, mule team or any kind of ordinary vehicle, and the track for the lower wheel was about two feet from the edge of the wall or crib.

As the coach approached this curve, it turned out from the usual track at a small angle, and gradually approached the edge of the wall, or crib, instead of following around the curve, and tracked along the log nearly its whole length, when, having passed beyond the highest point of its circumference, one of the wheels slipped over the outer side of the log, and the coach, horses and passengers were precipitated down the ravine. The respondent was very severely and dangerously injured, having his lower jaw broken in three places, the upper jaw separated from its bony attachment, his right shoulder dislocated and the right shoulder-blade broken, the skull fractured, the face, mouth and body bruised, contused and wounded. His injuries were of so serious a character as to render him entirely insensible for many days, and for a considerable time to render his recovery doubtful, and were such as to require the removal of portions of the bone of the lower jaw and to produce great and permanent disfigurement.

Up to the time of the trial of the case, more than a year and a half after the accident, he had not acquired the ordinary use of the lower jaw: the right shoulder and arm were stiff and weak and the hand partially paralyzed, being unable to perform any labor except with the left hand. The plaintiff was a laborer by occupation and the injuries to the right shoulder and arm were of such a character as to permanently impair his capacity for laborious pursuits.

Previously, and up to the time of the accident, he was a strong, healthy man, and had the perfect use of all the members of his body.

I. The first point made by counsel for appellant is to the effect

that the verdict is not sustained by the evidence when taken in connection with and confined to the allegation of carelessness and negligence contained in the complaint. And in support of this proposition it is argued that the only allegation of negligence contained in the complaint relates to the manner of driving and nothing else; that there is no evidence which explains the cause of the accident, and that there is evidence furnished by numerous experts which establishes the character of the driver for care and skill, which evidence rebuts the presumption of carelessness and negligence on his part, arising from the fact that the coach was overturned.

Admitting, for the sake of the argument, that the allegation of negligence is as narrow as counsel for appellant claims it to be, and that the cause of the accident is unexplained by the testimony, and that the general reputation of the driver for care and skill is established beyond question by the evidence, it does not follow that the overturning of the coach is to be charged to the account of unavoidable accident, or to some cause which human care and foresight could not prevent, and therefore the defendant excused from all liability for the consequences to the plaintiff. The argument places the burden of explanation upon the shoulders of the plaintiff; but, unfortunately for the argument, the law places it upon the shoulders of the defendant. Upon the trial of an action of this character, it is only necessary for the plaintiff to prove the overturning of the coach and the injuries caused thereby. Having done this he may rest, for the presumption is that the overturning occurred through the negligence of the coachman, and the burden of proving that there has been no negligence is cast upon the defendant. How the overturning occurred is no part of the plaintiff's case. The fact that the coach did overturn is all that he need establish in order to recover for such injuries as he may have sustained. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty or of some cause which human care and foresight could not prevent, for the law holds him responsible for the slightest negligence, and will not hold him blameless except upon the most satisfactory proofs. In doing this the defendant must necessarily explain how the overturning occurred, and if he fails to do this the presumption of negligence remains. Proof of the general reputation of the coachman for care and skill is not alone sufficient. Such proof, unaccompanied by any other, only serve to make the cause of the overturning still more inexplicable. And if the pleadings center all the negligence upon the driver, such proof is still insufficient, because the law

requires the defendant to show the coachman was not only careful and skillful, but that he used that care and skill to the best of his ability on the occasion in question. Counsel, by admitting that the overturning occurred, to the personal injury of the plaintiff, and that such overturning is unexplained by the evidence, admits that a cause of action has been established against which he has shown no defense. And we think, whether the complaint does or does not narrow the issue of negligence to the manner in which the coach was driven, is wholly immaterial so far as the point under consideration is concerned. The plaintiff did not undertake to prove where the negligence rested, nor did the law require him to do so; and in our judgment the defendant failed to show that it did not rest where he claims the complaint had placed it. At the point where the overturning occurred the road formed the arc of a circle. Instead of moving on the arc the team took the chord, and went so near the precipice as to allow the wheels to run off. There was no such abrupt turning out of the beaten track as would probably result from a sudden fright; on the contrary, the team seems to have moved in a straight line, or nearly so, instead of following the curve of the road. They were going up hill and moving in a slow walk. One cannot read the evidence in connection with the diagram contained in the record without coming to the conclusion that the overturning which caused nearly fatal injuries to the plaintiff, and death to some of the other passengers, was the result of careless inattention on the part of the coachman in not keeping his team in the road. This could not have happened from his inability to see the road, for it was a clear moonlight night, but it is most probable from the evidence that his inattention was the result of drowsiness, induced by the hour and the use of too much liquor.

II. The defendant, upon the trial, asked the court, among others, to give the following instructions:

1. "That in order to find for the plaintiff, the jury must find that the stage coach was driven in a 'careless, negligent or unskillful manner.' The court, upon its own motion, added after the word manner, 'or that there was some fault on the part of the proprietors.'

2. "If the jury believe, from the testimony, that the coach was upset by the act of the horses, as in becoming frightened, or from other cause which was not the fault of the driver, then they should find for the defendant." The court added to this instruction, after the word "driver," the words "or proprietors."

3. "If the jury find from the testimony that the driver (Miles

Nesmith) was a person of competent skill and in every respect qualified, and suitably prepared for the business in which he was engaged, and the accident was occasioned by no fault or want of skill or care on his part, then the defendant is not liable in an action for damages in this case, and the jury should find for the defendant." To this the court added, after the words "on his part," the words "or the proprietor."

Counsel for the appellant insists that if the foregoing instructions were correct in law, the court was bound to give them as asked, without any modification which would alter their sense, and in support of that proposition cites *Conrad v. Lindley*, 2 Cal. 173; *Russell v. Amador*, 3 Cal. 400, and *Jamson v. Quivey*, 5 Cal. 490.

To those cases, so far as they may be construed to uphold the doctrine that a party may of right insist that an instruction shall be given or refused, as asked, and that a modification thereof by the court, whether right or wrong, is of itself error, we are unable to give our assent. It is the duty and province of the judge to expound the law, and it is his right and privilege, in doing so, to select and make use of such language and illustration as, in his judgment, is best calculated to explain the same and render it clear to the comprehension of the jury. Upon him the law imposes the duty, and he may determine the manner of its performance. Counsel may propose such instructions as their wisdom may suggest, and submit them to the judge; but beyond this they have no legal right to dictate to the judge either the form or substance. If, in the opinion of the judge, such instructions are defective in form or expression, or erroneous in law, he may, at his election, modify them in either particular, and give them to the jury in their modified form, or he may refuse to give them altogether. If error be assigned upon such instruction, the test question is not, Did the judge modify the instruction? On the contrary, the test is the same as in other cases, and is to be applied to the instruction in its modified form; and if it appear that the instruction as modified correctly states the law, no error has intervened. This court passes upon instructions, so far as they are given, in the form in which they were received by the jury; and the fact that they were prepared by counsel, and, before given, modified by the court, cannot be regarded as error *per se*, or as having any bearing whatever upon the question of error. *Long v. Rogers*, 19 Ala. 321.

It is next claimed that the instructions as modified are erroneous because they are broader than the issue of negligence tendered in the complaint and instruct the jury in effect that they need not con-

fine their deliberations upon the question of negligence, solely to the manner in which the coach was driven, but may go beyond the driver in search of negligence, and inquire from the evidence whether the defendant was in fault in other particulars than the mere manner of driving. In support of this position it is argued that the allegation of negligence, as contained in the complaint, does not embrace the whole field of the defendant's obligation and duty, but is narrowed by the language used, to the carelessness and negligence of the coachman in managing and driving his team; that under this allegation the plaintiff could not recover if the overturning was the result of negligence other than careless driving, and that therefore the inquiries of the jury should have been confined by the court to the manner in which the coachman performed his duty.

The allegation in question is expressed in the following terms: "And this plaintiff further avers that the said defendant then and there received this plaintiff as such passenger in said coach and he then and there undertook, and it became its duty to use due and proper care to carry and safely convey in the said stage coach this plaintiff from Downieville to Marysville, via Goodyear's Bar and Forest City; yet the said defendant, regardless of its duties and undertakings, did not use proper care in the transportation of this plaintiff, but suffered and permitted the stage coach to be driven without due care and attention, and in so careless, negligent and unskillful a manner that," etc.

So far as what transpired at the trial can be gathered from the record, both parties and the court, up to the time the defendant submitted his instructions, proceeded upon the theory that there was nothing in the complaint restricting the field of inquiry. There was no evidence, however, except in one particular, which tended in the least to fasten blame anywhere except upon the driver. There was some slight testimony as to the character of the nigh wheel-horse and tending to show that he was inclined to shirk the performance of his share of the labor. Being upon the side of the precipice over which the coach and team were precipitated, it is possible that the failure of this horse to perform his duty may have had a slight tendency to swing the team and coach toward the bank, and thus in a measure the unfitness of this horse may be said to have contributed to the overturning of the coach. If the horse was unfit, and his unfitness contributed to the accident, the fault so far did not originate with the driver but with the defendant. But to this evidence counsel for the defendant did not object at the time, nor did he afterwards move the court to strike it out upon the ground

of variance. On the contrary he introduced evidence for the purpose of contradicting it and establishing the fitness of the horse. When the judge came to instruct the jury upon the application or on behalf of the plaintiff, he did so upon the theory that the whole field of the defendant's obligation and duty was open for investigation by the jury, and that they were not confined to the manner of driving; yet to these instructions counsel took no exception. On the contrary, the first four instructions asked by defendant, and given by the court, proceed upon the same theory, and the modifications of the court were only such as were necessary in order to make the defendant's instructions consistent with each other and in harmony with those which had been already given without objection.

Admitting then the narrow construction put upon the complaint by counsel for appellant to be correct, and that a slight portion of the testimony is at variance with the allegation, we think the defendant by his course at the trial waived the objection, or, in other words, failed to take advantage of it at the proper time. But it is not necessary to rest our decision wholly upon this ground. In our judgment the testimony shows beyond question that the whole fault lay with the coachman, and beyond his misconduct no fault attached to the defendant, and this is made so clear by the circumstances of the case in evidence that it cannot be presumed that the jury based their verdict upon any other ground of negligence than that averred in the complaint. The evidence against the horse was very slight, and the probability that his laziness contributed to the catastrophe still more so. Moreover, the testimony was successfully contradicted by the defendant, and with no show of reason can it be claimed that it had any influence upon the verdict. Such being the case, the instructions in question could not have misled the jury and put them upon a false scent. If there was any error, we are of the opinion that it did not prejudice the defendant's case.

III. It is next claimed that the verdict is a chance verdict, within the meaning of the second subdivision of section 193 of the Practice Act.

Admitting, as claimed by counsel, that the amount of damages given by the jury was ascertained by each marking a sum which he thought proper, then adding the several sums and dividing by twelve, and that it had been previously agreed that the quotient, whatever it might be, should be their verdict without further consultation, still, as we have decided in *Turner v. The Tuolumne Water and Mining Company*, 25 Cal. 397, such verdict was not a chance verdict within the meaning of that section; and, although

vicious, its character in that respect could not be established by the affidavits of the jurors who tried the case. There is no other evidence offered in support of the charge than that which comes from the jury, and it follows that the verdict stands unimpeached.

Nor can we disturb the verdict upon the ground that the damages are excessive. The rule upon this point is well stated by Mr. Justice Wilde in *Worster v. Proprietors of Canal Bridge*, 16 Pick. 547: "In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend upon computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. In the present case, the plaintiff was exposed to the imminent peril of his life, to great bodily and mental suffering, and we cannot say that the sum assessed by the jury exceeds a reasonable compensation. We do not consider whether or not we should have assessed the same amount of damages, if the case had been submitted to the court to decide; for, in a case like the present, men of sound judgment may differ not a little in estimating the compensation which the circumstances of the injury would justify; and it is the judgment of the jury, and not that of the court, which must govern. To justify the interposition of the court, the damages must be manifestly exorbitant."

We see nothing in this case to warrant the belief that the verdict is the fruit of passion or prejudice. *Aldrich v. Palmer*, 24 Cal. 513. Judgment affirmed.

On petition for rehearing.

Sanderson, Ch. J. — We are asked to grant a rehearing in this case upon two grounds: First—Because we have erred in holding that at common law the verdict in this case cannot be impeached by the affidavits of the jurors; and Second—Because we have erred in holding that the verdict is not a chance verdict within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act. In respect to these points this case was decided upon the authority of *Turner & Platt v. The Tuolumne Water & Mining Company*, 25 Cal. 397. We there held that, although there was some conflict of authority, the better rule was that, at common law, the affidavits of jurors could not be received for the purpose of impeaching their verdict. By so doing we did not establish the rule for the first time in this State; on the contrary,

we merely affirmed a rule which was established as early as the first volume of California Reports and has been strictly adhered to from that time to the present. In the case of *The People v. Baker*, 1 Cal. 405, Mr. Justice Bennett said: "We consider it a settled rule, founded upon consideration of necessary policy, that the testimony of a jurymen cannot be received to defeat his own verdict." In *Amsby v. Dickhouse*, 4 Cal. 103, Mr. Chief Justice Murray said: "It is well settled that a juror cannot be allowed to impeach his own verdict. The reason of this wholesome rule of law is too obvious to require any explanation."

The same rule was declared in *Castro v. Gill*, 5 Cal. 42, by Mr. Justice Heydenfeldt. In *Wilson v. Berryman*, 5 Cal. 45, the rule was again reiterated by Mr. Chief Justice Murray. In *The People v. Wyman*, 15 Cal. 75, the verdict was sought to be impeached upon the ground that it was not a fair expression of the opinion of the jury, and the affidavit of one of the jurors was relied on for that purpose. The opinion of the court was delivered by Mr. Justice Cope, who said: "We have repeatedly decided that this cannot be done." Thus the law of this question had become too firmly established in this State to be disturbed by the judiciary, and in order to effect a change it was found necessary in 1862 to resort to legislative action. This was done, and it was enacted that verdicts found by a "resort to the determination of chance" might be impeached by the affidavits of the jurors. But it is argued that while such is the general rule at common law, there are exceptions to it. Admitting this to be so, we answer, in the first place, that the Legislature of this State has legislated in regard to those exceptions, and that such legislation has superseded the common law. By declaring in what cases verdicts may be impeached by the affidavits of jurors, the Legislature upon the maxim, *expressio unius, exclusio alterius est*, has declared that verdicts of a different class shall not be so impeached. And we answer in the second place, if such exceptions exist, this verdict, viewed by the light of the common law as heretofore declared in this State, does not fall within the exception. In *Wilson v. Berryman*, before cited, the verdict was found by the same process as in the present case. The facts were brought to the notice of the court by an affidavit which was sworn to by one of the jurors and also by the sheriff. The court expressly held that the affidavit, so far as it was the affidavit of the juror, could not be received to impeach the verdict. Thus, however, it may have been elsewhere before the decision of the present case, in this State it had been judicially determined that verdicts like the present did not

fall within any supposed exception, but were within the general rule of the common law.

As stated in our opinion in *Turner & Platt v. The Tuolumne Water & Mining Company*, the authorities elsewhere are conflicting. We do not attempt to reconcile them; to do so would be impossible. We ground the rule upon the decisions and the legislation of this State, and we declare the law to be in this State, however it may be elsewhere, to the effect that the affidavits of jurors cannot be received in any case to impeach their verdict, except as provided in the second subdivision of the one hundred and ninety-third section of the Practice Act. And in conclusion upon this branch of the case, we may add that a line of judicial decision which struggles to multiply exceptions to a plain and simple rule, founded on considerations of the wisest policy, is not to be favored; on the contrary, the struggle should be to bring every case within the rule, lest the rule itself become shadowy, and in time wholly disappear in a multitude of exceptions.

Upon the point as to whether the verdict in this case is a chance verdict within the meaning of the one hundred and ninety-third section of the Practice Act, as amended in 1862, our opinion remains unchanged. In addition to what is said upon this point in our opinion in *Turner & Platt v. The Tuolumne Water & Mining Company*, reference may be made to the history of the amendment of 1862 for the purpose of ascertaining what the evil was which the Legislature had in view, and for which they sought to provide a remedy.

On the 1st of March, 1862, a judgment was rendered, upon the verdict of a jury, in the Twelfth District Court, in the case of *Donner v. Palmer*, 23 Cal. 40. For the purpose of showing how the verdict in that case was found, we make the following extract from the opinion of the court delivered by Mr. Justice Crocker:

"The affidavit of one of the jurors, Day, after stating generally what occurred in the jury room in the way of discussion and votes, states that a vote unanimous for the plaintiff was taken, but immediately thereafter Hiller and Fortune, who are charged with the misconduct, recanted and said their vote was not according to their convictions; and soon after the affiant saw Fortune approach Hiller, and heard him propose to the latter that he would place a piece of money and the latter should guess heads or tails, and if he guesses right then their verdict should be for the plaintiff; that Hiller assented; that Fortune then placed a piece of money and covered it so that the former could not see it; he guessed, and they an-

nounced that he had guessed right, and they thereupon agreed to a verdict for the plaintiff, but both said it was still contrary to their convictions."

Here was a clear case of chance, without any proof of the fact except by the affidavits of the jurors. Under the law as it then stood these affidavits could not be received. The Legislature was in session at San Francisco, where the case was tried. The verdict was rendered on the first of March. On the fifth of the same month the bill amending the one hundred and ninety-third section of the Practice Act so as to allow verdicts to be impeached by the affidavits of jurors, on the ground of chance, was signed by the Governor, and became a part of the law of the land. Thus, aside from the mere wording of the law, the intent of the Legislature is made clear by a legitimate reference to the facts and circumstances which led to the passage of the Act. The Act was made broad enough to cover the case then in the mind of the Legislature and others like it. In our judgment the verdict in this case is not like it. Some cases are cited by counsel where the court, in commenting upon verdicts like this, loosely employ the words "chance" and "hazard," but the precise question, to wit: whether such a verdict is a chance verdict, which is here directly presented, was not involved, the question there being whether such a verdict was good or bad. On the contrary the cases cited in our former opinion, and upon which it is based so far as authority is concerned, show that the precise question which we have considered was there considered and passed upon. Counsel has filed an able argument in support of his petition, but we find therein no reason for a change of opinion.

Rehearing denied.

YEOMANS V. CONTRA COSTA STEAM NAVIGATION COMPANY, AND OTHERS.

Supreme Court, California, July, 1872.

[Reported in 44 Cal. 71.]

CARRIER AND PASSENGER.—A lessee of an apartment upon a boat, paying a monthly rent, for the purpose of vending liquors and cigars, is not an employee of the steamboat company, and is entitled to the privileges and remedies of an ordinary passenger.

EXPLOSION—PASSENGER INJURED AT STATION.—Where plaintiff, a lessee of an apartment upon defendant's boat, while waiting on the station platform for the cars to take him to the boat was injured by the

explosion of the boiler of the locomotive drawing said cars, the steam-boat company was liable, plaintiff being held to be a passenger.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco. The facts are stated in the opinion. *Judgment for plaintiff affirmed.*

The following is the eighth instruction referred to in the opinion:

"If you believe from the evidence that an explosion of defendants' boiler took place at their depot on the 27th day of August, 1866, and the said plaintiff, while standing on the platform of defendants in the depot where passengers usually went in getting on and off the cars; that the plaintiff, while in that position, was then intending to take passage on said cars, and about to step into the baggage car, where he had often and usually ridden; that there was no regulation of defendants against his going in the baggage car, and the plaintiff, while in this position, was, without his fault, injured by an explosion of defendants' boiler, then the plaintiff has made out a *prima facie* case, and is entitled to recover, unless the defendants have shown that the explosion of the boiler was the result of inevitable casualty, or from some cause which attentive care could not prevent."

The following are the instructions asked by defendants' counsel and refused by the court:

"First—If the jury find from the evidence that at the time of, and long prior to, said explosion the plaintiff was, and had been, personally engaged in keeping the bar on said defendants' boat (employed in said trade) and occupied therein in selling to passengers on the trips to and fro, liquors, wines, cigars, etc., under an agreement between him and the defendants concerning the same, and under such agreement he usually ate with the officers and employees on said boat, and had a room there for his own exclusive use, besides its bar and appurtenances, then in passing to and fro on said boat and cars the plaintiff was not a passenger, in the proper legal sense of the term.

"Second—If the plaintiff, at the time of the explosion was the barkeeper on the defendants' boat, under the circumstances referred to in the last instruction, the plaintiff was a member of the establishment, and his relations to the defendants are very different from those of a passenger.

"Third—If the plaintiff were such a member of the establishment above referred to, he cannot recover from the defendants damages caused by the negligence of the engineer on said cars, if defendants used due care and prudence in selecting a competent person as engineer.

"Fourth—If the plaintiff was, and had for several years before been, such barkeeper on said boat, under the circumstances above referred to, then his subsequent agreement with Wells, Fargo & Co., to become their express agent, and acting as such express agent whilst continuing such barkeeper would not change his relation to the defendants or make him any the less a member of the establishment.

"Fifth—If the plaintiff, under an arrangement with the defendants was, at and long prior to the explosion, engaged as barkeeper on the defendants' boat, and as such passed back and forth on the defendants' boat and cars, paying no fare, then he took into account and assumed all the ordinary risks of the business in which he was engaged, among which must be reckoned the negligence of the workmen and employees of the defendants on their boats and cars; and for injuries by such negligence the plaintiff cannot recover.

"Sixth—If the jury cannot find from the evidence that either the defendants, the engineer, or any employee of the company, was guilty of any fault or negligence, and cannot account for the explosion, or arrive at any probable cause, they should find for defendants."

S. M. WILSON, for appellants.

ELISHA COOK, for respondent.

Niles, J. — The plaintiff recovered a judgment for damages for injuries received from the explosion of a boiler upon a locomotive owned by the defendants.

The appeal is taken from the judgment and from the order overruling defendants' motion for a new trial.

At the time of the injury the defendants were common carriers of freight and passengers between San Francisco and Petaluma, using steamboats between San Francisco and Rudesel's Landing, and between the latter and Petaluma a small locomotive and train of cars. There was no separate charge for passage; it was all one line and was under one management, the captain of the steamboat acting as conductor on the cars.

At the date of the accident the plaintiff was keeping a bar upon the steamboat under an agreement with the defendants, he paying to them the sum of two hundred dollars per month for the privilege and use of the bar, with the use of a stateroom and such meals as he might desire upon the boat, and receiving to his own use the profits of all sales of liquors, etc. In addition to his business as barkeeper he acted as express messenger under employment by Wells, Fargo & Co., and received from the express company for his services

in that capacity fifty dollars per month. Wells, Fargo & Co. paid to the defendants a monthly rate for carrying their packages and messenger over the route.

The plaintiff resided at Petaluma, and as he was about to enter the cars at that place, intending to make the usual daily trip to San Francisco, the boiler of the locomotive, then in charge of the defendants' engineer, exploded and caused the personal injury for which the plaintiff recovered judgment in this action.

At the close of the testimony the court, at the request of the plaintiff, gave to the jury the following instructions:

"First—If the jury believe from the evidence that the defendants were engaged in the transportation of passengers from San Francisco to Petaluma, and from Petaluma to San Francisco, before and during the month of August, A. D. 1866; that during this same period of time the plaintiff rented at a monthly or other rental of defendants, a bar on the steamer of the defendants, and travelled thereon to tend the same; that said steamer, during said period, ran on said route from San Francisco to a landing on the Petaluma Creek, from whence the passengers so transported were by defendants conveyed to the town of Petaluma, by cars propelled by steam, and from the town of Petaluma to said landing, by means of said cars; that for said rental of said bar it was understood and agreed as part of the consideration for the rental agreed to be paid by the plaintiff to the defendants, that the plaintiff should be transported on said route by said cars and steamer, without other or further charge; that on the 27th day of August, 1866, the said plaintiff came to said cars at the depot thereof at Petaluma, for the purpose of going to said steamer, and by and on said steamer to San Francisco, in attendance of said bar; that he was standing in the depot on the platform of defendants, usually occupied by passengers who were departing or arriving by said cars, for the purpose of getting on said cars, when the boiler of the locomotive attached to said cars blew up through the carelessness or negligence of the engineer of defendants, who was in charge of said locomotive, and the plaintiff was injured thereby (he, the plaintiff, not being guilty of any negligence contributing to his injury), the plaintiff is entitled to recover.

"Second—If the jury believe from the evidence that the defendants were engaged in the transportation of passengers from San Francisco to Petaluma, and from Petaluma to San Francisco, before and during the month of August, A. D. 1866; that during the same periods of time Wells, Fargo & Co. employed the plaintiff to carry their express matter between said places, and paid the defendants

to transport said express matter for a certain sum of money per month; and said plaintiff and said defendants entered upon said arrangement, and were engaged in the same during said period of time, and that it was understood and agreed between said defendants and Wells, Fargo & Co. that the plaintiff, as their messenger, should be transported with their said express matter from San Francisco to Petaluma, and from Petaluma to San Francisco during said period of time; that the defendants made such transportation by cars propelled by steam, and a steamer; that said cars started from the town of Petaluma; that while thus engaged the plaintiff, during said period of time, came to said cars, at the depot thereof, for the purpose of going to San Francisco; that he was standing on the platform of said defendants, near said cars, for the purpose of stepping into a car of defendants (and that said platform was usually used by passengers departing or arriving by said cars), when the boiler of the locomotive attached to said cars exploded, through the negligence or carelessness of the engineer employed by the defendants, who was then in charge of said locomotive, and the plaintiff was injured thereby (the plaintiff not being guilty of any negligence which contributed to his injury), then the plaintiff is entitled to recover damages for such injury."

The defendants excepted to these instructions, and contend that the case is within the reason of the rule that an employer is not responsible to his employee for injuries resulting from the negligence, carelessness, or unskillfulness of a fellow employee engaged in the same general business.

The rule itself cannot be questioned. It has been settled by a uniform series of both English and American decisions. The question comes upon the application of the principle to the present case.

The reason usually given in the cases for the rule, as we have stated it, is that a servant, in bargaining with his employer, is presumed to know the ordinary risks of the business in which he is to engage, and can obtain a compensation in accordance with the risks, or at his option decline the employment. Among the ordinary perils of the service are those arising from the carelessness or negligence of co-laborers, and they are presumed to be provided for in the bargain which he makes. He assumes the risk as a part of his contract of service. The duty of the employer in this regard extends no further than to the use of due care and prudence in the selection of competent servants in the several departments of the business. *Farwell v. Boston & Worc. R. R. Co.*, 4 Met. 49; *Albro v. Agawam Canal Co.*, 6 Cush. 77; *Ryan v. Cumberland Valley R. R. Co.*, 23

Pa. St. 385; *Russell v. Hudson River R. R. Co.*, 17 N. Y. 137; *Hard v. Vermont, etc., R. R. Co.*, 32 Vt. 477; *Shearm. & Redf. on Neg.* §§ 86, 88, 90, and cases cited.

The doctrine of these cases is not based wholly or mainly upon the theory that the employee is presumed to know the nature of the risk.

In the case of *Abraham v. Reynolds*, 5 Hurlst. & N. 147 (1), cited by the appellant, it was suggested by Chief Baron Pollock that the test in such cases was whether the party injured, knowing the risk, incurred it voluntarily; and, as an illustration of the principle, said that a guest at a house was in the same position as a servant, because he had the same means of judging the character of the house in which he was.

We do not think that the test suggested by the learned judge is sufficient. An ordinary passenger acquainted with the structure or management of steam engines might know that the boiler upon a steamboat or locomotive was unsafe, or might observe that the engineer was careless or incompetent, and yet be willing, from motives of necessity or interest, to encounter the risk of travel. Yet this knowledge upon his part would not absolve the carrier of passengers from liability for damages for injuries received by the passenger from the negligence of the engineer, or insufficiency of the boiler.

The co-laborer cannot recover in such a case, because he knowingly entered into a contract, from which the law implies an assumption by him of these very risks.

We do not think the present case comes within the letter or reason of the rule. As messenger for Wells, Fargo & Co., merely, it is not contended that the plaintiff would not have occupied the position

1. The facts in *ABRAHAM v. REYNOLDS*, 5 H. & N. 143, were: A. sold to B. some bales of cotton, which were in the upper story of a warehouse. B. employed C. to see it weighed, and lower it by means of a rope into a cart, which he contracted with D. to provide for it, who sent his servant E. for that purpose. In lowering one of the bales the rope broke, through the negligence of C., in consequence of which the bale fell on E. and injured him:—Held, first, that E. might

maintain an action against B. Held, secondly, that there was not even evidence to go to a jury, that at the time of the accident E. was either a fellow-servant of C. or a volunteer. But it is not in every case where a party works with the servants of another for a common purpose, that he becomes a volunteer, so as to prevent his maintaining an action against that party for an injury accruing from the negligence of his servants while working for the common purpose.

of variance. On the contrary he introduced evidence for the purpose of contradicting it and establishing the fitness of the horse. When the judge came to instruct the jury upon the application or on behalf of the plaintiff, he did so upon the theory that the whole field of the defendant's obligation and duty was open for investigation by the jury, and that they were not confined to the manner of driving; yet to these instructions counsel took no exception. On the contrary, the first four instructions asked by defendant, and given by the court, proceed upon the same theory, and the modifications of the court were only such as were necessary in order to make the defendant's instructions consistent with each other and in harmony with those which had been already given without objection.

Admitting then the narrow construction put upon the complaint by counsel for appellant to be correct, and that a slight portion of the testimony is at variance with the allegation, we think the defendant by his course at the trial waived the objection, or, in other words, failed to take advantage of it at the proper time. But it is not necessary to rest our decision wholly upon this ground. In our judgment the testimony shows beyond question that the whole fault lay with the coachman, and beyond his misconduct no fault attached to the defendant, and this is made so clear by the circumstances of the case in evidence that it cannot be presumed that the jury based their verdict upon any other ground of negligence than that averred in the complaint. The evidence against the horse was very slight, and the probability that his laziness contributed to the catastrophe still more so. Moreover, the testimony was successfully contradicted by the defendant, and with no show of reason can it be claimed that it had any influence upon the verdict. Such being the case, the instructions in question could not have misled the jury and put them upon a false scent. If there was any error, we are of the opinion that it did not prejudice the defendant's case.

III. It is next claimed that the verdict is a chance verdict, within the meaning of the second subdivision of section 193 of the Practice Act.

Admitting, as claimed by counsel, that the amount of damages given by the jury was ascertained by each marking a sum which he thought proper, then adding the several sums and dividing by twelve, and that it had been previously agreed that the quotient, whatever it might be, should be their verdict without further consultation, still, as we have decided in *Turner v. The Tuolumne Water and Mining Company*, 25 Cal. 397, such verdict was not a chance verdict within the meaning of that section; and, although

It was a contested issue whether the plaintiff was or was not a passenger, and the jury were required substantially to find this issue in favor of the plaintiff, before applying the principle of law embodied in the instruction.

Third—the sixth instruction asked by the defendants was substantially given in the charge of the court, and a repetition of it could not benefit the defendants.

We see nothing in the other points made by the defendants which requires special notice. The record discloses no error which calls for a reversal.

Judgment and order affirmed.

MITCHELL V. SOUTHERN PACIFIC RAILROAD COMPANY.

Supreme Court, California, December, 1890.

[Reported in 87 Cal. 62.]

RIDING ON PLATFORM—DERAILMENT OF TRAIN.—Where plaintiff, while a passenger on defendant's train, left his seat in the car, and stood upon the platform, alleging that from the speed of the train he feared an accident might happen, and believed the platform would be a more safe place, and while there the train was derailed and plaintiff was injured, and on the trial there was a question as to whether the conductor was on the platform with plaintiff or in the car, it was error to permit plaintiff's objection to the question to a passenger sustaining the conductor's statement that he and plaintiff went upon the platform together and that he returned to the car before the accident while plaintiff remained on the platform, as such question was an important one to show whether plaintiff acted as a prudent man, and for such error judgment for plaintiff should be reversed.

APPEAL from a judgment of the Superior Court of Monterey County and from an order denying a new trial. *Judgment reversed.*

"The following instructions were given by the Superior Court upon the subject of the burden of proof, and of the right of plaintiff to be upon the platform of the railroad car: 'The court instructs you that the burden of proving negligence rests on the party alleging it; and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence. In this case, the plaintiff claims he was injured through the negligence of defendant's employees. So that if you find, from the evidence, that the weight of evidence is in favor of the defendant, or that it is equally balanced, the plaintiff cannot recover, and your

verdict must be for the defendant. The plaintiff can recover in this action only upon proof of defendant's negligence; but in order to prove that negligence, it is not necessary for the plaintiff, if he was injured by the overturning of the car in which he was riding, to prove how or why that overturning occurred. It being admitted, as already stated, that the plaintiff was a passenger on the train of the defendant, and that he had paid, and the defendant had accepted, his fare, all that the plaintiff need establish in the first instance, in order to enable him to recover in this action, is, that the car in which he was riding was overturned without his fault, and that by reason thereof he suffered the injuries complained of. When the plaintiff has done this he may rest, and is at that point entitled to your verdict; for the presumption is, that the overturning of the car occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast upon the defendant. How or why the overturning occurred, it is no part of the plaintiff's case to show; the fact that the car did so overturn is all that he need establish, in order to recover for such injuries as he may have sustained, unless his want of ordinary care contributed to such overturning, or to his injury. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty, or of some cause which human care and foresight could not prevent; for the law holds it responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs. In doing this, the defendant must necessarily explain how the overturning occurred, and if it fails to do this, the presumption of negligence remains. The court further instructs you that if you find, from the evidence, that at the time plaintiff left his seat in the smoking car there was no imminent peril of life or limb, and no apparent danger, but that such imminent peril of life or limb, or apparent danger, arose after plaintiff took his position on the platform of the smoking car, then plaintiff cannot recover, and your verdict must be for the defendant. The court further instructs you that if you find, from the evidence, that the plaintiff left his seat in the smoking car and went to the platform of said car, and stood there awhile, then jumped off, he, plaintiff, did so at his own risk, and the defendant cannot be held responsible for any injuries he, plaintiff, may have received, even if the person in charge of the train saw him and did not tell him to go inside of the car. The failure of the person in charge of the train to direct or command him to go inside is not such negligence as will render the defendant liable. The person in charge of the train was under no

legal obligation to notify him that such a place was not the proper place for him to be. If you believe that the plaintiff went upon the platform under a reasonable apprehension of a derailment of the train, and for the purpose of jumping off in case of an accident, and while there for that purpose was injured by the overturning of the car, I instruct you that his being on the platform under these circumstances was not riding or standing on the platform within the meaning of the rule which prohibits such riding or standing. Though you should believe, from the evidence, that had the plaintiff remained inside of the car he would not have been injured, this does not, in itself, bar a recovery by him in this action, though it turned out, in the end, that the platform was a more dangerous place than the inside of the car; yet if the danger of overturning was imminent, and the plaintiff, acting upon the instinct of self-preservation, placed himself in the position which appeared to him, as a reasonable man, to be most safe, and made such choice as a person of ordinary prudence and care placed in the same situation might have made, this does not constitute negligence on the part of the plaintiff. The peril of remaining in the car or going upon the platform is to be judged by the circumstances as they then appeared, and not by the result. The fact that passengers inside of the car were not injured does not prove that the plaintiff was imprudent or negligent in going upon the platform; he was compelled to choose the hazard which appeared to him to be the least; that is, to act upon the probabilities as they appeared at the time.' ” The jury returned a verdict in favor of the plaintiff for \$11,000 damages.

S. F. GRIL, and **H. V. MOREHOUSE**, for appellant.

D. M. DELMAS, for respondent.

Paterson, J.— This is an action to recover damages for personal injuries sustained by plaintiff while travelling as a passenger on one of defendant's trains.

Appellant contends that the judgment and order should be reversed, because plaintiff failed to show negligence in the management of the train, or any defect in the defendant's railroad track.

It is doubtless true, as claimed by appellant, that in cases of this character the burden of proof is upon the plaintiff to establish negligence on the part of the defendant, and that the mere fact that a passenger was injured while on his journey is not sufficient to raise a presumption of negligence on the part of the carrier. But in this case not only is the injury admitted, but the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time the accident occurred the train

was running down a steep incline leading to the bed of a river, on a new and curved track, at an unusual and dangerous speed. This showing was sufficient to throw upon the defendant the burden of proving that the injury was not caused by any want of care on its part. *Boyce v. Cal. Stage Co.*, 25 Cal. 460 (1); *Lawrence v. Green*, 70 Cal. 417, 59 Am. Rep. 428 (2); *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175; *Breen v. N. Y. C. R. R. Co.*, 109 N. Y. 297.

At the time the accident occurred the plaintiff was standing on the platform of the smoking car, and it is claimed that he cannot recover for the injury sustained by him, and that defendant is relieved from responsibility therefor by the provisions of section 484 of the Civil Code, which reads as follows: "Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section." Plaintiff admitted at the trial that defendant had proper notices, as required by this section, posted in all of its cars, and that he had full knowledge of their contents before the accident. He testified that he had gone out upon the platform immediately before the accident, in consequence of the fear that some disaster would occur; that his attention was directed to the speed of the train as soon as it passed over the top of the grade and began to descend; that the great and unusual speed at which the train was going, taken in connection with the fact that the road was new and temporary, led him to believe that an accident would occur, and that he went out upon the platform intending to jump therefrom to the sand on the inside of the curve, where he believed he would escape with less injury than if he remained in the car, and that he had no sooner reached the platform than the car was overturned and he was thrown upon the ground; that he had been for a long time in the employ of Wells, Fargo & Co., had acquired a knowledge and skill as to the movement of trains, could distinguish between the degrees of speed by the motion of the train,

1. *Boyce v. Cal. Stage Co.*, 25 Cal. 460, is reported in 9 Am. Neg. Cas. 66, *ante*.

2. See note of *Lawrence v. Green*, 70 Cal. 417, in 9 Am. Neg. Cas. 68, *ante*.

and that the train ran faster on the day of the accident than ever before.

The evidence of the defendant tends to show that the plaintiff had been upon the platform several minutes before the accident occurred, but if the jury believed the testimony of the plaintiff, it was for them to say whether the circumstances were such as would lead a person of ordinary prudence to act as the plaintiff did. The inquiry is: Where there has been an unsuccessful attempt to escape danger in an accident, was the attempt which was made an unreasonable or rash act? Or was it one which a person of ordinary care and prudence might do under the circumstances? The answer to this inquiry cannot be made to depend upon the result of the attempt to escape, nor upon the result which would have occurred if the attempt had not been made. It would be unreasonable to require a passenger in case of accident to judge with absolute certainty the degree of danger attending him if he made no effort to escape, and the absolute consequences of an effort to escape. He must act upon the probabilities of an effort to escape as they appear to him, and choose that hazard which seems to him, as a person of prudence, to be the least. Of course, the facts that he was injured in the attempt to escape, and that those who remained in the car escaped without injury, are circumstances which the jury should consider in determining whether he acted as a man of ordinary prudence would under the circumstances; but where he has acted in the manner described, it cannot be said that his attempt to escape constituted contributory negligence. *Twomley v. C. P. N. & E. R. R. Co.*, 69 N. Y. 160 (1), 25 Am. Rep. 162; *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418 (2), 38 Am. Rep. 597.

In *Buel v. N. Y. C. R. R. Co.*, 31 N. Y. 319 (3), 88 Am. Dec. 271, the court said: "The statute exempts a railroad company from liability to a passenger who shall be injured while on the platform of a car, etc., in violation of the printed regulations of the company, posted up at the time, in a conspicuous place, inside of its passenger cars then in the train; provided the company, at the time, furnished room inside its passenger cars sufficient for the proper accommodation of the passengers. Laws of 1850, c. 140, sec. 46. There was in this case a printed regulation pursuant to this statute posted in

1. *Twomley v. Central Park, etc.*, R. Co., 69 N. Y. 158, is reported in 5 Am. Neg. Cas. 217.

2. *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418, is reported in 6 Am.

Neg. Cas. 176.

3. *Buel v. N. Y. Cent. R. Co.*, 31 N. Y. 314, is reported in 5 Am. Neg. Cas. 87.

a conspicuous place inside the car, prohibiting passengers from standing or riding on the platform of any car. But no statute nor the regulation has any application to a present one. * * * The statute was intended to prevent an imprudent act of standing or riding on the platform, and to absolve railroad companies from responsibility for injuries which might happen at that place when a passenger is on the platform, while justifiably entering or leaving the cars." It was held that although the plaintiff was injured when he tried to escape from the car in a collision, and although he was in the same car with him, who kept their seats, escaping, he could not be held guilty of contributory negligence for not acting with ordinary care and prudence.

We have carefully examined the instructions of the jury, and find no error in any of them.

The court erred in sustaining plaintiff's objections to the questions asked by defendant as to the conduct of the passengers who remained in the car, and whether any of them was injured by the action of other passengers in such cases is a part of the *res gestae*, and to show what they, being in a dangerous situation, deemed prudent conduct. They had an equal interest in protecting themselves, and will be presumed to have done what appeared to them to involve the least risk.

This error was cured, however, by other testimony which appears not to be disputed—showing that there were other passengers in the car besides plaintiff, and that they remained in their seats until the car was overturned, and all escaped.

There is another error assigned, based upon the ruling of the court to allow defendant to ask how often plaintiff had traveled on the road prior to the accident; but as evidence on the issue was introduced afterwards without objection, no prejudice can be presumed from the ruling complained of.

There was one error which we think was prejudicial and entitles the appellant to a new trial. The plaintiff testified that the car left the track immediately after he reached the platform "just as I [he] had stepped out of the car door the car crashed." It was claimed by the defendant, and it attempted to show that plaintiff was improperly on the platform; that he was on the platform through fear of an accident; that he had been standing on the platform in violation of its regulations several minutes before the accident occurred, and was consequently guilty of contributory negligence. The conductor testified that he left the smoking

three minutes before the accident occurred, and that plaintiff went out with him; that the train was not going as fast then as it had on former occasions at the same point, and while plaintiff was on board; that he gave the brakeman orders to let off the brakes, walked back into the smoking car and took his seat, while the plaintiff remained standing on the platform. The defendant then called S. W. Smith, who was one of the three passengers in the car at the time of the accident, and he was asked to state whether Mr. Clark, the conductor, returned into the smoking car after he and plaintiff left it, and before the accident occurred. Plaintiff objected to the question, on the ground that it was immaterial; the court sustained the objection, and defendant excepted.

The question whether plaintiff went upon the platform under the circumstances narrated by him was a most important one; in fact the main question in the case is, whether he acted as a prudent man would under the circumstances. In determining that question, the length of time he remained upon the platform, and the conduct of others on the train, including the officers of the train, is material, competent, and important. The testimony of the conductor, if true, would tend, not only to impeach the testimony of the plaintiff as to the length of time he stood on the platform, but directly to prove that there was no apparent reason for alarm at the time the accident occurred. To enable the jury to decide whether the conductor's account of the circumstances, or that of the plaintiff, was correct, the testimony of Smith, a disinterested witness, might have been important. It certainly was material and competent, and should have been admitted.

Judgment and order reversed, and cause remanded for a new trial.

McFARLAND and FOX, J. J., and BEATTY, Ch. J., concurred.

WORKS, J., concurred in the judgment.

SHARPSTEIN, J., dissented.

Thornton, J. (dissenting) — I dissent. The exclusion of the testimony of Smith on which the reversal is ordered could not possibly have caused any injury to the defendant. Evidence of the return of the conductor before the catastrophe occurred in which the plaintiff was injured was already in and uncontradicted. The conductor had already testified to the fact of such return. The time of the return of the conductor from the platform could not possibly show how long the plaintiff stood on the platform, as the conductor, when he returned, left the plaintiff standing on the platform. The evidence shows that the conductor and plaintiff went on the plat-

form at the same time. The conductor returned, leaving plaintiff on the platform. How could the time of the return of the conductor show how long plaintiff remained on the platform after such return? If the return of the conductor from the platform could show anything as to the time that the plaintiff remained on the platform after such return, the fact of his return was already in evidence and uncontradicted. A case carefully and laboriously tried should not be sent back for a new trial for an error, if any, so trifling.

LYNN V. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, June, 1894.

[Reported in 103 Cal. 7.]

RIDING ON PLATFORM—THROWN OFF CAR AT CURVE.—Where a passenger boarded a train and was obliged to ride on the platform, owing to the crowded condition of the cars, and the train was run at a high rate of speed upon a curved track, or over cross-tracks, causing a severe jar or jolt whereby the passenger was thrown from the platform and was injured, the railroad company was negligent, and was liable in damages to the passenger.

RIDING ON PLATFORM—WHEN NOT CONTRIBUTORY NEGLIGENCE.—A passenger was not guilty of contributory negligence in riding upon the platform of a train where it was shown that the cars were crowded, and there was no warning not to so ride.

APPEAL, from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. The facts appear in the opinion. *Judgment affirmed.*

W. H. L. BARNES, for appellant.

COPE, BOYD, FIFIELD & HOBURG, for respondent.

Garoutte, J. — This is an action to recover damages for injuries received by the plaintiff while a passenger upon the road of the defendant. The injuries were of a permanent character and very serious, and the verdict of seven thousand five hundred dollars is not assailed as being excessive. The defendant appeals from the judgment and order denying a motion for a new trial.

The record discloses no exceptions taken to the introduction or exclusion of testimony. Neither are there any exceptions taken to the charge of the court. A motion for a nonsuit was made, and denied, and this appeal is now before us upon the question as to the sufficiency of the evidence to support the verdict of the jury. There being no exceptions to the charge of the court—and it is possible

no just exception could have been made thereto—the law by which we are to be guided in considering the merits of this appeal is settled, and all investigation upon that point foreclosed; for the law of the case, as far as the decision of this court is concerned, is the law that guided the jury in its deliberations in the trial court.

The undisputed facts of the case may be stated as follows: Upon the thirtieth day of May, 1891, a legal holiday, the plaintiff was a passenger upon the defendant's train of cars travelling from San Francisco to Shell Mound Park, having purchased a return ticket. The train was an excursion train, there being a picnic at the aforesaid park. Late in the afternoon he boarded a train to return to the city, but, owing to the great number of people desirous of returning to the city at that time, he, in company with many others, was unable to secure room inside of the cars, and thereupon stood upon the platform. The exact cause of the accident is a disputed question, but in course of the return trip the plaintiff fell from the platform and was badly injured.

That portion of the charge of the court which is material to the present investigation is as follows:

"I instruct you, therefore, that if, from all the evidence given before you, you believe that the said train stopped at Shell Mound station, the plaintiff was justified in taking passage thereon, unless you also believe the defendant or its servants gave warning to persons there in waiting not to take passage thereon, and that such warning was understood, or ought to have been understood, by the plaintiff; and, if he took passage thereon without such warning given, he was rightfully a passenger on said train, and it was then the duty of the defendant to furnish him room and accommodations inside of the passenger car; *and further, if you believe that the plaintiff did not in fact hear or know of any warning given, if you believe any was given, then he cannot be affected by such warning, and was justified in taking passage on that train.*

"Keeping in mind what I have already said to you, I further instruct you that if, from all the facts and circumstances given in evidence before you, you find and believe that plaintiff was lawfully upon that train as a passenger within the rules just stated to you, upon the return passage from Shell Mound, and that the defendant failed to furnish him room inside the car by reason of its crowded condition, and that he was obliged to, and did, for that reason, stand and ride upon the platform, and if you believe that while he was so standing and riding on the platform the defendant, by its servants, negligently and carelessly managed and ran its said train at such a

rate of speed, so that, by reason thereof, in passing over a curve in said railroad, * * * that the car upon the platform of which plaintiff was so standing was, by reason of such careless, negligent management of the train, and by such rate of speed, so swayed, shaken, jarred, and jolted, that the plaintiff, without any fault or negligence on his part, but by or in consequence of the negligence of the defendant, as charged in the amended complaint, was thrown off from said car and the platform thereof to and on the ground, and thereby injured, your verdict will be for the plaintiff.

"I also instruct you that if a railroad company receives upon its cars more passengers than it can furnish accommodations for inside the cars, and for that reason some are compelled to stand and ride on the platform, it is the duty of the company to take that condition of things into account in the management of the train and the rate of speed with which it is run. It cannot act in disregard of the actual state of things which it permits or suffers. In that case the obligation of the railroad company to passengers whom it receives upon crowded cars is that it will furnish such increased and more watchful and solicitous care, skill, and attention as the crowded condition of the cars require.

"If, therefore, the crowd of passengers applying for passage or crowding upon the cars is so great that it cannot be controlled by the train officers, and thereby overcrowds and overloads the train, it is the right of such officers to hold the train until they can secure the proper control of it, and as between the company and passengers on board, to whom tickets have been sold for the trip, entitling them to travel thereon, it is the duty of the train officials to do so, and to furnish room inside to all such persons. If they, however, proceed upon the trip without doing so, it is their duty to use the utmost care and diligence of very cautious persons for the safe carriage of the passengers, having regard to the actual location upon the train which the latter are compelled to take. The omission to use such degree of care is negligence on the part of the company."

The verdict must be sustained upon all questions where a substantial conflict of evidence is presented by the record. Measured by this test, respondent's evidence must be taken as true, and it follows that this train was travelling at a very rapid rate of speed, and, while so moving, owing to the fact that it was running upon a curved track, or over cross-tracks, or for both of these causes, a severe jar or jolt was occasioned which caused respondent to fall from the platform underneath the wheels of the car. In this regard the plaintiff testifies as follows: "The train on this occasion ran

faster than it ever did before. It ran very fast. * * * It ran down to the mole very fast. In my experience, it ran faster than it usually did going down there. It continued at that rate of speed up to the time I fell. * * * At the point where I was jolted off, the train was going unusually fast." The manner of the accident is thus described by him: "The way I experienced it, the car was kind of going half over off the track and gave a sudden jolt, and the way in giving this jolt I lost my hold behind me of this iron rod I had hold of, and I felt myself going, and I fell off, and that was all I know of it. One of the jolts was made near the switch there. [Pointing to the diagram.] Well, it seemed the wheels struck, and kind of threw the car half way over like. That was the sensation I had, and I could hear everybody scream. It broke my hold. I don't remember what situation I went off in, or how I struck."

The witness, Miss Hilda Treanor, says: "After the train left Shell Mound and came down to the Oakland mole, it was running very fast. I remember about the time Mr. Lynn fell off, or was thrown off, the train seemed to lurch a little bit. When he was thrown off I heard an outcry among the ladies inside of the car. About that time I heard a great many exclamations of surprise, for instance, 'Gracious!' and 'My Gracious!' and words meaning the same thing. The lurch of the train partly threw down the persons who were standing within the aisle of the car. It had the same effect upon them as it had upon me; it threw them down. I mean by that I would have fallen upon the floor but for the people standing around me. They went over on the seats against people who were sitting in the seats. As far as I can recollect, people were unbalanced, and I myself would have fallen on the floor had there not been somebody I fell against. As it was, I did not fall right over, and as far as I noticed everybody standing in the aisle the same thing happened to them."

Captain William Treanor says: "The train seemed to be running extremely fast, as I thought, as it came down the Oakland mole. * * * The train gave a very heavy lurch, and knocked a number of people down who were standing in the aisles where I was. I was standing up and the young lady just inside the door, and we both got knocked down, and fell over. I was facing the forward end of the car, and both of us got knocked over to the right. The women screamed. Some of them said the car must have jumped the track. I cannot remember that the car slowed up prior to that time. * * * The train ran faster than I have been in the habit

of feeling trains run. * * * I thought it ran faster than I had ever seen it run on that road. * * * But where I saw the lurched down on the mole, I could not positively define the point, it was running at an extraordinary fast rate of speed."

The testimony of these witnesses is controlling upon these questions, and applying the law given by the trial court to the jury as to the great care which should be exercised by a common carrier where the cars were so heavily overloaded, as in the present case the jury were entirely justified in saying that the defendant was guilty of negligence in running its train at the rate of speed that this train was moving, especially in view of the defects in the track or roadbed, whatever they may have been, that caused the jar or jolt to the cars, which, as we have seen, so greatly disturbed the passengers. The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances; but if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligations to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars.

Was the plaintiff guilty of contributory negligence? In view of the instructions of the court, it is clear that he was not. In speaking as to the claim of the defendant that warning was given, the court instructed the jury: "If you believe the plaintiff did not in fact hear or know of any warning given, if you believe any was given, then he cannot be affected by such warning, and was justified in taking passage on that train." The plaintiff testified in unequivocal terms that he did not hear or know of any warning given, and many other passengers testified to the same effect with reference to themselves. The evidence in this regard is sufficient to create a substantial conflict as to whether in fact the passengers were warned not to crowd the train and that a second train would soon arrive; but, beyond the question of conflict of evidence, the plaintiff says he heard and knew of no such warning, and, under the law given to the jury which we have just quoted, he had a right under those circumstances to go upon the train, and, if there was no room within the car, he then had a right to stand and ride upon the platform; and, being so situated by the force of circumstances over which the defendant, as we have seen, had complete control, he was a lawful passenger with all the rights of any other passenger, and entitled to the same

care and consideration at the hands of the company. The fact that he was compelled to stand upon the platform, and was thus more unfortunate and more inconvenienced than his friends who were able to crowd within the car, is wholly immaterial. Their legal rights were the same. The duties and obligations of the defendant to them were the same.

It is claimed the verdict is contrary to law in this, that the court charged the jury that if they found as a fact that other cars, reasonable in number and seating capacity, were produced by the defendant within a reasonable time, prior to or after the time at which plaintiff took his position on the car, and on which plaintiff might have safely ridden, and that plaintiff was apprised thereof, an eager desire on his part to take the overcrowded car in order to reach his destination was not a reasonable cause of necessity. The evidence covered by the instruction, substantially stated above, is not such as to make the question one of law. It may be said that the evidence is fairly conflicting, both as to the additional accommodations to be furnished, and that the plaintiff was apprised thereof. Again, all presumptions are in favor of the verdict. And if the court's charge includes instructions of law sufficient to support the verdict when applied to the evidence found in the record, then the verdict must be upheld, even though there be no sufficient evidence to support the verdict upon some other theory of the case covered by other instructions of the court. It follows that if the evidence, when considered in the light of the law we have quoted, is sufficient to support the verdict, then the verdict cannot be against law.

We also think the motion for a nonsuit was properly denied. Much that we have already said as to the sufficiency of the evidence to support the verdict is opposed to appellant's contention in this regard. As we have seen, the evidence established a want of proper care in the running of the train at a high rate of speed, and doubly so when we consider that defects in the track or other causes existed which caused the severe jolting and jarring of the cars. Neither was the defendant guilty of contributory negligence in riding upon the platform under the circumstances depicted by his evidence. The law given to the jury by the court upon this point is entirely sound.

For the foregoing reasons, it is ordered that the judgment and order be affirmed.

HARRISON and VAN FLEET, J. J., concurred.

ESREY v. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, March, 1891.

[Reported in 88 Cal. 399.]

STANDING BETWEEN TRACK AND PLATFORM—STRUCK BY TRAIN.—Where plaintiff stood in a space between the track and a raised platform, and was struck and injured by a passing train of defendant's, she believing she could safely stand there without being struck by the train, she was guilty of contributory negligence, although defendant's employees saw her in time to have avoided the accident, and could not recover, where it was not shown that the running of the train against plaintiff was willful or wanton, and judgment for plaintiff for \$5000 was reversed (1).

APPEAL, from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. The facts appear in the opinion. *Judgment reversed.*

E. L. CRAIG, HORACE HAWES and P. D. WIGGINTON, for appellant.

JUSTIN JACOBS and W. A. GRAY, for respondent.

Vaneliff, C. — This was an action for damages for personal injuries. The plaintiff had a verdict and judgment for five thousand

1. On a subsequent trial of this case there was a verdict and judgment for plaintiff, which, on appeal, was affirmed (103 Cal. 541). In its opinion the court said (per GAROUTTE, J.): "For our present purposes the following facts, as testified to by plaintiff, are deemed material: Upon attempting to leave the depot grounds of defendant, and with a view of going around the end of the depot platform, plaintiff crossed the railroad track, and thereupon found herself between the outside rail of the track and the platform of the depot, which platform was about five feet in height; and the width of this intervening space was about three feet. At this moment of time a train came backing toward her, composed of flat-cars, which prevented her going further, and for her own safety she stood against the side of the platform, with the object of allowing the cars to pass by. The original

width of this space being but three feet, and the cars extending some distance outside and beyond the track, it is apparent that she at this time was in such close quarters as to be not only in an unpleasant position, but it may be said a dangerous one. And it will be further conceded that she found herself in that position by reason of her own thoughtlessness and want of care. One or more cars passed her at this time, and there is no question but that the two brakemen, and possibly the engineer and fireman, saw her standing in this position. The train was backed a short distance beyond the point where she stood, when it stopped a moment, a box-car was attached thereto, and it then started to retrace its course. When the box-car came to the point where plaintiff was standing, it being wider than the flat-cars, and leaving a space next to the platform of not more than four-

dollars, and the defendant appeals from the judgment, and an order denying its motion for a new trial.

The following are the material facts: The accident occurred at Leemore, a small town between Tulare and Huron, on the afternoon of February 13, 1889. The plaintiff had gone to the depot with a friend, one Miss Furnish, to bid good-by to an acquaintance, one Mrs. Shively, who took the freight train which passed Leemore about that time. The general features of the locality are as follows: The main track ran east and west. Almost parallel with it, and a few feet to the south, was a side-switch which ran alongside a platform about four feet high and came into the main track a little farther to the east. The platform was about one hundred feet long, and was about three feet from the first rail of the side-switch. The train was headed towards the east, its forward part, consisting of the engine and some flat-cars, uncoupled from the caboose (which was left standing in the main track opposite the platform) for the purpose of taking on some box-cars which were on the western end of the side-switch.

Mrs. Shively got into the caboose, and the plaintiff and Miss Fur-

teen inches, it inevitably struck her, and the injury resulted. Upon the foregoing state of facts we think the jury entirely justified in finding a verdict in favor of plaintiff." (In view of the suggestion of the court when the former appeal was heard, the plaintiff prior to the present trial in the court below amended her complaint, by charging the acts of the defendant to have been willfully and wantonly done). Continuing the court said: "Whatever may have been said by the court in the former appeal, as to the character and weight of evidence was said expressly in view of the fact that the willfulness and wantonness of the acts of defendant were not matters before the court; and for these reasons we are not called upon to compare the evidence disclosed by the record in that case with the evidence now before us, for the purpose of showing any existing differences therein, and thus avoiding the bind-

ing effect of the principle of the law of the case. It is conclusively shown that the evidence was considered in the light of the complaint then before the court, and in that light alone, when we look to the language of the opinion. It is there said: 'But the defendant's employees saw her in time to have avoided the accident, and hence were bound to use care. The brakemen ought to have stopped the train, and, if necessary, compelled her to get out of harm's way.' If such was the duty of the brakemen (and we have no doubt of it) the defendant was liable in damages for a violation of that duty; for the brakemen did not stop the train and allow or compel the plaintiff to remove from her dangerous situation. And the language used by the learned commissioner indicates that if the complaint had been sufficiently broad in its allegations the judgment would not have been reversed." Judgment affirmed.

nish, having taken leave of her, started to go around by the western end of the platform to the street, which crossed the track there. They changed their minds, however, and went towards the eastern end. By this time the engine and the platform-cars were backing down the side-switch, and plaintiff was aware of the fact. She says: "I knew the train was switching before I crossed, but I thought I had time to escape any danger." "And I thought that the space between the cars—I had never paid any particular attention to that,—and I thought that the space between the cars and the platform would be wide enough that I could walk right along without being injured in the least." She "crossed the switch just at the end of the box-cars." Miss Furnish did not cross the switch. In this regard plaintiff says: "At this time Miss Furnish was with me. She did not cross the track with me. I told her I thought we had ample time to get across. I don't know what her answer was exactly. I know she didn't come. I could not say whether she said anything to me about going, or that there was not time to cross the track before the cars came. There was no time for talking. She might have spoke, but I did not hear." Miss Furnish says that she did not cross because she was afraid.

There were two brakemen employed on the train. One of them (Ferguson) was on the ground near the box-car, for the purpose of signaling the engineer. The other (Williams) was on the end of the flat-car, but got down to make the coupling when the end of the train neared the box-car. He says: "A young lady ran in between the box-car and the flat-car, and I told her to 'get out of there, or you will get hurt,' and she said, 'I am not afraid.'" The fact that he did say this is corroborated by Miss Furnish, by one Benton, "an engineer and pumper" about the station, and by Mr. Shively. The plaintiff says that if the brakeman spoke to her she did not hear him, and it is assumed that her statement in this regard is true.

After she had crossed the switch, she found that she had not time to get around the platform before the end of the train reached her, so she stood with her back against the platform. While standing in this position, the flat-cars passed her, but did not touch her, and she does not seem to have been alarmed. In this regard her testimony was as follows:

"Q. The brakeman at this time was about six feet from you. Could you not have spoken to the brakeman, and asked him to hold on until you could get around the corner? A. Yes, sir; I could. Q. Did you attempt to? A. No, sir. Q. Did you do anything b

press back against the platform? A. I did not, because I thought I was perfectly safe."

The same sense of security appears from her conversation with Mrs. Shively. The latter says: "I looked out the caboose window and saw the plaintiff standing between the flat-car and the platform. I told her I thought it was a dangerous place where she was. She said she was all right;" and the plaintiff admits that this conversation occurred.

The defendant's employees evidently shared plaintiff's opinion that there was no danger; for they paid no further attention to her. The brakeman Williams says: "I went about my work, made the coupling and Mr. Ferguson, the other brakeman, gave the signal to go ahead. When he gave the signal to go ahead, the girl was out of my sight. I did not see her. She must have gone behind the box-car, or I would have seen her." The engineer says he did not see her when he got the signal. And the fireman, who had seen her cross the switch, says: "She disappeared from my sight; I cannot tell which way she went." And he went on ringing the bell without troubling himself further about the matter.

The plaintiff's account does not differ materially from this. Her testimony is as follows:

"Q. You did not ask either brakeman to stop the train? A. No, sir. Q. But simply pressed back against the platform? A. I did. Q. State whether or not you are positive that both these brakemen saw you. A. I am positive. Q. I ask you now with reference to that. Do you mean to say at this time that both of these brakemen were looking at you at the time the car was coupled and you were standing here, pressed up against the platform? A. I mean to say that both could have seen me. Q. You mean to say that both could have seen you? A. Yes, sir. Q. You don't mean to swear positively that they were both looking at you at that time? A. I didn't say they were looking at me at that time, but I know positively they both saw me. They saw me standing there. Q. At some time? A. At some time. Q. You don't mean, then, however, to be understood by the jury that at the time the coupling was made and the signal given to start that both these brakemen were looking at you in this position? A. I could not say they were looking at me just at that time, but I am positive they both saw me. Q. As I understand, you are positive that while you were standing there, and the train was coming in, that they saw you over on that side of the car? A. Yes, sir."

These extracts show clearly enough that the employees on the

train saw the plaintiff go in between the flat-cars and the box-cars, and saw her standing up against the platform as the flat-cars passed her, but paid no further attention to her, apparently sharing her belief that she was safe.

But neither she nor they seem to have thought of the fact that the box-cars were wider than the flat-cars. She says: "When the cars began to move, I noticed that the box-car was considerably wider than the flat. Then I fully realized my danger. Not until that time." The first box-car struck and crushed her shoulder. Whereupon she threw herself upon the ground and the train passed without injuring her further.

All of the foregoing facts appear without substantial contradiction. The only conflict is as to whether she heard the brakemen tell her not to go in there, and for the purpose of the opinion it is assumed that she did not hear him.

Upon these facts, it seems clear that her own negligence contributed directly and proximately to the injury. She had voluntarily placed herself in a dangerous position—a position in which, as it turned out, she would be almost certain to be injured by the running of the cars in the ordinary way, and from which her more prudent companion shrank back in fear. Now, if the defendant's employees had not seen her position of danger, the defendant would have owed her no duty to take any particular precaution, and consequently would not have been guilty of negligence. *Toomey v. Southern P. R. R. Co.*, 86 Cal. 374. But the defendant's employees saw her in time to have avoided the accident, and hence were bound to use care. The brakemen ought to have stopped the train, and if necessary, compelled her to get out of harm's way. They did not do this; and hence were guilty of negligence. But the complaint does not charge that there was anything willful or wanton against the defendant. It simply alleges that the defendant "carelessly and negligently" ran one of its cars against the plaintiff; and this is all that the evidence shows. For this negligence on the part of the defendant, plaintiff would have had a cause of action if there had been no contributory negligence on her part. But the rule is, that wherever the negligence of the plaintiff contributed directly and proximately to the injury, there can be no recovery. Such negligence must have contributed to the injury, not remotely, but directly and proximately. *Needham v. S. F. & S. J. R. R. Co.*, 37 Cal. 409; *Kline v. C. P. R. R. Co.*, 37 Cal. 406 (1), 99 Am. Dec. 282; *Fernan-*

1. *KLINE v. CENT. PAC. R. CO.*, 37 Cal. 400, 406, is reported in 8 Am. Neg. Cas. 58.

des v. Sac. R. R. Co., 52 Cal. 53. But I think that such was the case here. The plaintiff's negligence was certainly not remote in point of time. She voluntarily went into a dangerous place, where she had no right to be, and the brakemen very foolishly allowed her to do so. The fatal mistake after this was in not thinking of the fact that the box-cars were wider than the flat-cars; and this was evidently shared by all the parties. The plaintiff probably was correct in the opinion which she expressed to Mrs. Shively shortly after the accident. "She said it was some of her foolishness; it was her own fault. I asked her, 'What in the world did you go in there for?' She said, 'some of her own foolishness.'"

I think the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

BLANCHER, C., and **FOOTE, C.**, concurred.

THE COURT:—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

BRATTY, CH. J., dissented.

Rehearing denied.

WALKING ON TRACK AT STATION WHILE WAITING FOR TRAIN—KILLED BY TRAIN.—In an action to recover damages for alleged negligence of defendant in causing the death of plaintiff's intestate, the plaintiff was nonsuited, from which judgment she appealed. On appeal, the Supreme Court (per **DR. HAVEN, J.**) said: "The evidence given upon the trial shows that defendant was, on May 19, 1889, operating a double-track railroad on Encinal Avenue, in the town of Alameda, and on that day the decedent was killed by one of its moving trains at Webster station, on that avenue or street. The station consisted of a house or shed built upon the sidewalk, and the space between the sidewalk and defendant's track was three feet in width, and the sidewalk was only two or three inches higher than the roadway between it and the railroad track. The deceased, at the time of the accident, was waiting for one of defendant's trains, intending to take passage thereon for San Francisco, and he was the holder of a ticket which entitled him to do so. While thus waiting for the train, which was soon expected, he walked up and down near the station on the roadway between the sidewalk and the railroad track, and in going one way was facing in the direction from which the expected train was to come. He had been thus walking for from five to eight minutes before the accident, and had just turned his back upon the approaching train when it came in sight of others at the station; but he continued to walk along between the sidewalk and the track, and did not look around or take any notice of the train, which was coming behind him. The bell upon the engine was kept ringing all the time as the train

approached, but no alarm-whistle was sounded until the engine was within six or eight feet of the decedent. When the alarm-whistle was sounded, deceased stepped partly upon the track, and was struck by the engine. It does not appear very clearly just when the deceased was first seen by those in charge of the train, but he might have been seen by them if they had looked toward him as soon as the train came in sight of the station, a distance of four hundred five hundred feet. The fireman was the only one on the train who saw him, and he testified that he did not give the danger-signal to the engineer until just before the deceased was struck. When the engineer received this signal, he blew the whistle, reversed the engine, and did all that was possible to stop the train. It also appears from the evidence that deceased had good sight and hearing. The accident occurred in the daytime, and the train could have been seen by deceased in ample time for him to have escaped injury if he had looked in the direction from which it came after it was in sight of the station or had listened for its approach. Upon these facts, it is clear to us that the judgment must be sustained, and that deceased, in walking where he did, in dangerous proximity to the track of defendant, without looking or listening for the approach of the train for which he was waiting, and finally stepping partly upon the track in front of the moving engine, was guilty of such contributory negligence as defeats plaintiff's right to recover damages in this action. Indeed, it would be difficult to imagine a clearer case of contributory negligence upon the part of a person injured than is presented by the evidence in this case." Judgment affirmed. **GEORGE LEZINSKY**, appeared for appellant; **FRANK SHEPHERD**, for respondent. *Supreme Court, California, January, 1893.* **H. V. South Pacific Coast Railway Co.**, 97 Cal. 161 (1).

FISHER V. SOUTHERN PACIFIC RAILROAD COMPANY.

Supreme Court, California, June, 1891.

[Reported in 89 Cal. 399.]

PASSENGER INJURED ON FREIGHT TRAIN—ASSUMPTION OF

RISK.—In an action to recover damages for injuries sustained by plaintiff while riding as a passenger upon one of defendant's freight trains due to alleged violent coupling of cars, the jar throwing

1. **JAMISON v. SAN JOSE & SANTA CLARA R. R. Co.**, 55 Cal. 593 (1880), was an action for damages for injuries sustained by plaintiff while a passenger on defendant's road, the injury occurring by reason of plaintiff falling into an excavation on a dark night, due to unguarded and unlighted plankway over which passengers were required to pass when being discharged from one car and transferred to another. Plaintiff recovered judgment for \$300. On appeal, was affirmed.

from his seat and seriously injuring him, it was held that persons who travel on mixed trains assume the extra risk incident to such trains, the carrier using such diligence and care as is required on passenger trains, so far as such care is reasonably consistent with the freight business.

FREIGHT TRAIN.—The different conditions attending the running of a freight train are proper matters to be taken into consideration by the jury in determining whether there has been negligence.

EXCESSIVE DAMAGES.—A verdict for \$30,000 held excessive on the facts of the case.

APPEAL from a judgment of the Superior Court of Stanislaus County, and from an order denying a new trial. *Judgment reversed.*

"Upon the trial of the case there was a conflict between the medical witnesses as to the extent and permanency of the plaintiff's injury. It appeared in evidence that the jolt of the cars threw the plaintiff from his seat against the stove near which he was sitting, and he then fell backward. He claimed to have suffered a rupture, and also an injury to the chest and spine as the result. One physician, who testified for the plaintiff, was of the opinion that there was a permanent spinal injury, while two physicians, who testified for the defendant, were of the opinion that the spine was not affected. The jury found a verdict in favor of the plaintiff for \$30,000."

W. L. DUDLEY, for appellant.

D. M. DELMAS, for respondent.

Temple, C.—Appeal from judgment and order denying defendant's motion for a new trial.

Action for damages through alleged negligence of defendant, a common carrier of passengers for hire.

On the 29th of August, 1889, defendant was operating a railroad between Oakdale, in the county of Stanislaus, and Stockton. On that day plaintiff purchased a ticket at the office in Oakdale, and immediately boarded the train for Stockton. The train was composed of one empty box-car, eight empty gravel-cars, two loaded box-cars, and a passenger-car. It was a regular train, principally for freight, but habitually carried passengers, and tickets were always sold at the ticket-office for this train. It is shown to have been so run for a period of four years before the injuries complained of. At this time there were some fourteen passengers on the train.

At a place called Burnett's Station, where there was a gravel pit, the train made a stop to exchange its eight empty gravel-cars for nine loaded gravel-cars. To accomplish this, the engine, the empty box-car, and the gravel-cars separated from the other cars, ran up

the main track past the switch, leaving the two loaded box-cars and the passenger-car with brakes set, there being an up grade at this place. After getting rid of the empty cars, the engine with the empty box-car was coupled to nine loaded gravel-cars, and they were let down the grade by gravitation alone, without steam, to the part of the train which had been left on the grade with brakes set. A conductor and two brakemen were in charge of the train, but the conductor and one brakeman had ridden the empty cars into the pit, the other brakeman turned the switch to put the train back upon the main track, and then jumped upon the engine or tender, so that there were no brakemen on either part of the two portions of the train to be coupled, no conductor to superintend, and no persons between the two parts to be coupled. There was what was called left-hand curve, and the conductor could not see either the end of his portion of the train or the cars to be taken on. The fireman from the left-hand side, could see, and gave signals to the engine. The cars had to be let down the grade some seven hundred or eight hundred feet, and between the engine and the space were the gravel-cars and the empty box-car, about three hundred feet from the train.

Upon receiving the signal "one car," meaning that there was a length of one car between the parts to be coupled, the engine stopped. He testified, put all the brakes on and left nothing undone. He had all necessary appliances in good order.

There was, however, a violent jar at the coupling, which threw the plaintiff from his seat, diagonally across the car, some three or four feet, hitting a stove with his left side. He fell upon his back and was partially unconscious for a time, receiving, as he claims, a serious injury.

The defendant claims that this was not a passenger train but a freight train, with a caboose-car attached; that regular passenger cars were run upon the road, for which plaintiff's ticket would have been good; that it is more difficult to manage freight-cars, and the exigencies of such a train expose it to some peculiar dangers which render the same care impracticable; and that it should not be expected that there would be the same completeness in equipment as on purely passenger trains.

These views are presented as objections to an instruction, given to the jury in the instance of plaintiff, as follows: "The court instructs the jury that the law of this State is, that a railroad company carrying passengers for paying fare must use the utmost care and diligence for the safety of the carriage, and must provide everything necessary for that purpose."

The language is taken from section 2100 of the Civil Code, omitting the concluding words of the section: "And must exercise, to that end, a reasonable degree of skill."

It is claimed that these words constituted an important qualification of the rule, rendering it incumbent upon the defendant to provide not every possible or even the best possible contrivance for the purpose, but only to exercise a reasonable skill to that end, and that the instruction ignored in part the theory of the defense,—1. That the jar resulted, not from carelessness, but because the practical operation of this train in which plaintiff chose to ride demanded that it be managed and equipped not as a passenger but as a freight train; 2, the jar was only such as was to be expected upon a freight train; and 3, that the amount of care consistent with the operation of such a train was exercised.

I know of no principle by which the statute can be limited so as not to apply to all carriers of passengers for hire. If one insists on going by a train which does not habitually carry passengers, a different rule may prevail. Of course the different conditions attending the running of a freight train are proper matters to be taken into consideration in determining whether there has been negligence. It was proper for the jury to take into consideration the fact, if it were so, that in the coupling of loaded freight-cars such violent jerks and jars are likely to occur, and might happen without negligence; and also that the practical operation of the train required that it be equipped as a freight rather than as a passenger train; but certainly the increased difficulty did not justify any remission of diligence and care. This train regularly carrying freight and passengers, rendered the company liable for the full degree of diligence enjoined by the statute.

It cannot, I think, be held that the omitted clause, requiring the exercise of a reasonable degree of skill in providing everything necessary for the safe carriage of passengers, refers, applied to the facts of this case, to the use of the freight train for the purpose of carrying passengers. If so, it would seem to prohibit the use of such train altogether, if it is conceded that it cannot be made as safe for that purpose as a passenger train. The qualification is not, as counsel seems to contend, that only reasonable diligence need be used; but to require, in addition to diligence, skill in providing what is necessary.

Section 2101 of the Civil Code—the next section—enjoins the carrier to provide safe and fit vehicles, and declares he is not excused for default in this respect by any degree of care. Common

sense teaches us that these sections must not receive a construction so absolute as to practically prohibit railroad passenger traffic, or such a useful and common convenience as a mixed or accommodation train; but to find any letting down of the standard of diligence, in the omitted clause, is to impart a meaning diametrically opposed to its manifest intent, which, as stated, simply adds to the requirement of diligence, skill in the use of it.

The reasonable rule would therefore seem to be that those who travel on mixed trains assume the extra risk necessarily incident to such trains or the traffic, the carrier using such diligence and care as the code requires on passenger trains, so far as such care is possible and reasonably consistent with the freight business.

The injury was not claimed to have resulted from the failure to provide everything necessary. The sole issue, as to negligence, was in regard to the manner of coupling the two parts of the train at Burnett's Station, and the jury were, in substance, so instructed, at the instance of plaintiff.

I cannot see, therefore, how the omitted clause could have helped the defendant, or that the instruction as given ignored or took from the jury the consideration of any evidence or argument rebutting the presumption of negligence created by plaintiff's evidence.

On cross-examination of Woolsey, a witness called as an expert by defendant, plaintiff's counsel was allowed, against the objection of defendant, to read statements from medical works, and to ask the witness if he agreed with the authors. This is assigned as error.

Plaintiff's counsel defends the ruling here, on two grounds: 1. That the witness, on his direct examination, testified to certain medical opinions and supported his statements by the assertion that they conformed to the authority of medical works; and he claims that the rule is, that if the witness, either in direct or cross examination, relies in any manner upon the authority of medical works, generally or specifically, it is proper cross-examination to confront him with the works upon which he relies, to show that his understanding of them is incorrect, or to contradict him; and 2, that it is proper cross-examination to test the competency of the witness as an expert, or the value of his opinions.

A careful examination of the evidence has convinced me that the rulings complained of cannot be defended upon either of these grounds, though the legal proposition be admitted.

As to the first, it is plain that some of the extracts read have no reference to any opinions of the witness which he sought to sustain by a reference to medical writers, either generally or specifically,

except in response to a direct question by plaintiff referring to such writers.

As to the second ground, it is not so plain. The value of an effective cross-examination as a means of showing the incompetency of a witness or his lack of integrity and the true value of his testimony can hardly be overrated; and this is true in a special sense as to expert testimony, where the party may choose from the body of a profession those whose opinions are most favorable. It is quite natural, and certainly common, for one called as an expert to enhance his authority by his power of self-assertion, and there is reason to fear that these opinions are not always as impartial and indifferent as a judicial utterance should be.

While it is to be regretted if in the proper exercise of the right of cross-examination it shall appear that certain medical writers of repute differ from the witness, and so a party will get the benefit of unsworn testimony, still this evil, unavoidable in the nature of things, is, in my opinion, not at all commensurate with that which would deprive a party in such a case of the best touchstone known to legal science, by which to estimate the value of testimony.

And if, on general principles, such questions are legitimate on cross-examination, I do not see how a party can be deprived of his right because such evil consequences may follow.

All the works on medical jurisprudence which I have examined seem to sustain this position, and some cases, although they are not uniform. *Brodhead v. Wiltse*, 35 Iowa, 429; *Conn. Ins. Co. v. Ellis*, 89 Ill. 516; *Ripon v. Bittel*, 30 Wis. 614; *Pinney v. Cahill*, 48 Mich. 584; *State v. Wood*, 53 N. H. 484.

But since consequences are likely to follow which admittedly should be avoided if possible, such examination should be strictly limited to this one purpose, for which only it can be permitted.

I think no fair-minded person can closely study this record without being convinced that the evidence was not put in with any such purpose. No doubt counsel offered it under the impression that it was justified as inconsistent with opinions which the witness had claimed were sustained by medical authorities. I have shown that the claim cannot be sustained on that ground. In fact, although the witness took issue with some statements read, they cannot fairly be said to contradict his evidence in any respect.

They were evidently intended as evidence for the plaintiff, to sustain his theory of the case, and not to affect the competency of the witness or the value of his testimony.

As it seems to me a new trial must be granted for this error, it becomes unnecessary to review the other assignments.

The judgment and order should be reversed, and a new trial granted.

FITZGERALD, C., and FOOTE, C., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial granted; and the court is further of the opinion that the amount of the verdict was excessive.

De Haven, J. (concurring) — I concur in the judgment. The court erred in permitting the attorney for the plaintiff, upon the cross-examination of the witness Dr. Woolsey, to read extracts from certain medical books, and then ask the witness whether he agreed with the same or not. *Marshall v. Brown*, 50 Mich. 148; *City of Bloomington v. Shrock*, 110 Ill. 22, 51 Am. Rep. 678; *Rogers on Expert Testimony*, secs. 181, 182. It is not permissible on cross-examination, to call the attention of such a witness to what is said on the subject to which he is testifying, by standard works, for the purpose of testing his general knowledge or competency as an expert. It has been held, however, that when an expert asserts that his opinion agrees with a particular author, it is not improper to call his attention to what that particular author says, for the purpose of contradicting him. But there was nothing in the evidence of Dr. Woolsey to justify reading to him, and in the presence of the jury, the extracts referred to, for any such purpose. I think, also, that as the evidence does not establish a case for punitive damages, the sum awarded by the verdict is excessive.

FALLS V. SAN FRANCISCO AND NORTH PACIFIC RAILROAD COMPANY.

Supreme Court, California, January, 1893.

[Reported in 97 Cal. 114.]

OBSTRUCTION ON STATION PLATFORM—PASSENGER INJURED.—Where a passenger at a flag station, intending to board one of defendant's trains, walked along the platform in broad daylight and tripped upon some packages and fell and was severely injured, and it was shown that reasonable care for the accommodation of passengers had been taken by defendant, and that the accident could not have been reasonably anticipated, the defendant was held not liable for the accident, and judgment for plaintiff was reversed.

FLAG STATIONS—FREIGHT AND PASSENGER PLATFORMS.—

At flag stations established for the convenience of the inhabitants of sparsely settled territories as well as for the benefit of the railroad company, the company has the right to use the platform for depositing freight and for the accommodation of passengers.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. The facts appear in the opinion. *Judgment reversed.*

CHARLES F. HANLON, for appellant.

HASSETT & TEVLIN, for respondent.

Paterson, J.—This is an action to recover damages for personal injuries received by plaintiff upon the defendant's platform at Reed's Station, Marin County. The jury returned a verdict in favor of plaintiff for the sum of \$7,500, and judgment was entered accordingly. Defendant appealed from the judgment, and from an order denying its motion for a new trial.

The plaintiff testified that on the nineteenth day of May, 1888, she went from San Francisco to Reed's Station to attend a Sunday-school picnic. She returned to the station about 4 o'clock in the afternoon, and sat on the side of the platform until the train came along on its way from San Rafael to Tiburon. While waiting for the train, about one hundred people who attended the picnic were passing up and down the platform and sitting along on the ties. As the train approached, she arose, and while passing along the platform to reach the rear end of a car which she intended to board, she tripped against something and fell. As she fell she noticed that the obstacles were milk-cans fastened together. Upon attempting to rise, she found it impossible to do so, and subsequently discovered that she had sustained a fracture of the pelvis and dislocation of the left hip. On cross-examination, plaintiff testified that she did not know how far she walked after she arose from the side of the platform, and she could not tell how many people were upon the platform at the time, and they seemed to be all around her. When asked as to how far along the platform she could see as she was walking, she replied that she was not looking at the platform at all, but was looking to see where she could get on the car; that she might have been in a little hurry, but did not know; that the cars were perfectly still at the time, that when the crowd started to go aboard, she followed; that it was perfectly light at the time; that the cans were lying about thirty feet from the place where she had been sitting; but she did not see them till she tumbled over them.

At the station there is a wooden building, fourteen by twenty-four feet, with a platform in front of it, extending to the first rail, and thirty feet in length. Between the rails of the track nearest the building the space is planked the same length as the platform attached to the station. Adjoining this there is a raised platform five feet in width and one hundred and eighty-three feet in length raised eight inches above the cross-ties. The station is one where trains stop for passengers or freight only upon receiving flag signals. The company keeps no agent there, and all freight received left on the platform by the consignor, and taken up by the conductor and billed as per marks and instructions thereon. It is left upon the platform until the consignees take it away. There is a daily shipment of butter and milk from this station to the city. It is received at 6:20 A. M., and 5:00 P. M., and the empty cans and boxes are returned from San Francisco at 9:20 A. M. and 6:15 P. M. the following day. The evidence shows that the cans could conveniently be left at any other place than on the platform. The milk-cans and butter-boxes are carried in the baggage-car. At the time of the accident there were upon the platform two or three butter-boxes, and some milk-cans alongside of them. The cans and boxes were about the middle of the platform, with room enough to pass upon either side—more room between the packages and the car than on the other side. The butter-boxes were two and a half feet wide, three feet long and twelve or fourteen inches high.

The foregoing is the substance of all the testimony introduced except that relating to the character of the plaintiff's injuries and her sufferings.

The negligence complained of consists in the alleged failure of the defendant "to provide sufficient and safe access through the station along the same (station) to its said cars, to wit, by allowing the cars to be and remain therein"; and the question is, upon the facts shown, the defendant was guilty of negligence as claimed by the appellant that if negligence be conceded, contributory negligence on the part of the plaintiff is clearly shown for that reason she cannot recover; but in view of our conclusion upon the question of defendant's negligence, it is unnecessary to pass upon that contention.

In *Thompson on Carriers of Passengers* it is said: "The carrier's liability in respect to the condition of his premises is no greater nor less than that of any person to another, who, by invitation or inducement, express or implied, has come upon the premises."

ises for the purpose of transacting business. A duty of protection is owed to such persons by the carrier, but it is needless to remark that this does not amount to a warranty of the safe condition of the premises; neither is the carrier held bound to bestow upon their condition that extraordinary degree of vigilance which the law, from motives of the soundest policy, imposes upon him in regard to the carriage of his passengers. The passenger, who, while in actual progress upon his journey is exposed to countless hazards, gives himself wholly in charge of the carrier. But a rule properly ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazards incident to the journey itself, the rigor of the rule above announced is justly relaxed, in that at such a time and place the carrier is bound to exercise only a reasonable degree of care for the protection of his passengers." *Pennsylvania Co. v. Marion*, 104 Ind. 242 (1). "The rule in such cases is, that the carrier is bound simply to exercise ordinary care, in view of the dangers to be apprehended." *Kelly v. Manhattan R'y Co.*, 112 N. Y. 443. Whether there has been an exercise of such care depends upon the circumstances of the case—the nature of the road, and the character of the traffic and place where the accident occurred. Thus it has been held that "at a mere way or flag station, where trains do not regularly stop for the reception and discharge of passengers, and only stop when they are flagged, or to discharge a special passenger, a passenger need not expect or rely upon the company's having furnished a platform or other convenient place for the reception and discharge of passengers." *Cincinnati, etc., R. R. Co. v. Peters*, 80 Ind. 172 (2). Accommodations of the same character cannot be expected in the cities and at way-stations. Flag-stations like the one under consideration are established for the convenience of the inhabitants of sparsely settled territories as well as for the benefit of the company, and would have to be discontinued if the railroad companies were required to keep and maintain freight and passenger depots, with agents to care for the same. At such stations the companies have the right to use the platform for depositing freight and for the accommodation of passengers. *Arkansas, etc., R. R. Co. v. Canman*, 52 Ark. 525 (3).

1. *Penn. Co. v. Marion*, 104 Ind. 239, 242, is reported in 3 Am. Neg. Cas. 175. See subsequent appeal in same case, 123 Ind. 415, 3 Am. Neg. Cas. 261.

2. *Cincinnati, etc., R. Co. v.*
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Peters, 80 Ind. 168, 172, is reported in 3 Am. Neg. Cas. 133.

3. See note of *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 525, in 9 Am. Neg. Cas. 55, *ante*.

The only question is, therefore, whether the defendant, acting as a reasonable person would under the circumstances, ought to have foreseen that such an accident might have happened. If such an accident might reasonably have been anticipated by the defendant, the failure to remove the obstructions constituted actionable negligence; "for negligence in a legal sense is no more than this: the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." *Barrett v. Southern Pacific Co.*, 91 Cal. 302.

We do not think it can be fairly said that the defendant ought to have anticipated that an accident would occur in broad daylight in consequence of leaving the packages on the platform. "The company, as held in some cases, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning everyday incidents of railway travelling, and the company could do business upon no other basis." *Malcom v. R. R. Co.* 106 N. C. 64. It is the duty of railroad companies to give their passengers a reasonable time and opportunity to approach and leave their trains, and the duty is reciprocal. Passengers owe it to themselves and to the company to act with reasonable care in alighting from and boarding trains. *McDonald v. L. I. R. R. Co.*, 116 N. Y. 548, 15 Am. St. Rep. 437 (1); *Penn. R. R. Co. v. Lyons*, 129 Pa. St. 119, 15 Am. St. Rep. 701 (2). In *Cornman v. E. C. R. R. Co.*, 4 Hurl. & N. 781 (3), it appeared that the company had on their platform, standing against the pillar which passengers passed in going to and from the train, a portable weighing-machine, the foot of which was elevated about six inches above the level of the platform. Plaintiff was at the station on Christmas day, inquiring for a parcel, when he was

1. *McDonald v. Long Island R. Co.*, 116 N. Y. 548, is reported in 5 Am. Neg. Cas. 298.

2. *Penn. R. R. Co. v. Lyons*, 129 Pa. St. 119, is reported in 6 Am. Neg. Cas. 320.

3. In *Cornman v. Eastern Counties Railway Company*, 4 H. & N. 781, it appeared that a party being at a railway station in the daylight, with a crowd of persons, awaiting the arrival of a train, caught his foot

against the edge of a weighing-machine, the base of which was raised a few inches above the level of the platform, and falling broke his knee-cap. The machine was of a description in use at railway stations, and was in its usual place, adjoining the end of a counter on which passengers' luggage was placed on the arrival of trains, and was used for weighing luggage:—*Held*, that there was no evidence of negligence.

driven by the crowd against the machine, in which his foot became entangled, and was injured. The court held that there was no evidence of negligence to go to the jury, the machine being located where it might easily have been seen, and the accident not being one which could have been reasonably anticipated. (Reported in Thompson on Carriers of Passengers, 76.) In *Stokes v. R. R. Co.* 107 N. C., 178, it appeared that the bridge across the ditch leading to the defendant's track was in good condition, except that one plank was slightly shorter than the other. The plaintiff, in the daytime, attempted to get on the train, but stepped into the hole caused by the short plank and was injured. The court held that it was not actionable negligence.

The case is a sad one, the injuries and sufferings of the plaintiff being of a most distressing nature, but we cannot, without injustice to the company, and establishing an unwarranted and dangerous precedent, allow the verdict to stand on the evidence before us.

Counsel for respondent claims that the specifications of particulars in which the evidence is sufficient to support the verdict are fatally defective; but in this we think he is in error; they fully present all the points upon which the defendant relied on its motion for a nonsuit, and the motion for a new trial.

Judgment and order reversed.

Hearing in Bank denied.

DENVER, SOUTH PARK & PACIFIC RAILWAY COMPANY v. WOODWARD.

Supreme Court, Colorado, December Term, 1877.

[Reported in 4 Colo. 1.]

DERAILMENT OF TRAIN—PRESUMPTION OF NEGLIGENCE.—

If a car is overturned, and a passenger, in consequence, is injured, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted by showing that the accident itself was such that human prudence and foresight could not have guarded against it.

PASSENGER KILLED IN DERAILMENT—DEFECTIVE SWITCH.

—Where a defective switch caused the overturning of a railroad car, and a passenger was killed, the railroad company was held liable.

APPEAL from District Court of Arapahoe County. *Judgment affirmed.*

A defective switch on the track of the appellant caused the overturning of a car, resulting in the death of James Smith who was being conveyed as a passenger over appellant's road. Woodward, his administrator, brought an action for the use of Salome Smith, the widow. The declaration was in the ordinary form in case; plea of the general issue. The plaintiff below had judgment on the verdict in the sum of \$5,000. The facts as well as the positions contended for in this court by the appellant are sufficiently set forth in the opinion. The instruction relative to compensatory damages referred to in the opinion of the court was as follows:

"Seventh—If you find for the plaintiff on the question of negligence, you will, in determining the amount of damages to be assessed, take into consideration the evidence touching the probable accumulations of the deceased during the remainder of his life, that is, during the probable duration of his life, if he had not so come to his death, which would have gone to the benefit of his wife, having reference to his age, bodily health, occupation, habits and abilities to work—provided his wife was dependent upon him for support."

SAYRE & BUTLER and HUGHES & WELBORN, for appellant.

SYMES & DECKER, for appellee.

Thatcher, Ch. J. — This action is wholly statutory. It is founded upon section one of "an act concerning damages," approved February 8th, A. D. 1872. (Laws of 9th session, p. 117), which provides "when the death of any person is caused by the wrongful act, misconduct, negligence or omission of another, the *personal representatives* of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she lived, against the latter for the same act, misconduct, negligence, or omission, provided the action shall be commenced within two years from the date of the death of the injured person, etc."

We are confronted *in limine* with the question as to whether to entitle a *personal representative* to recover in an action founded upon this statute, it is necessary, where the general issue only is pleaded, that he shall prove his character as such. Where an administrator, in his representative character, brings a suit upon a cause of action accruing to his intestate, and in his declaration makes *profert* of his letters of administration, he is not bound to produce the letters at the trial where the defendant has pleaded the general issue only. In such case the general issue admits the due appointment of the administrator, and puts the plaintiff upon proof of the alleged cause

of action. The plaintiff's character is not questioned, but only his right to recover on the merits. *Brockington, Adm'r v. Vereen*, 1 Bailey (S. C.) 447; *Kowanchi v. Askew*, 17 Ark. 595; 2d Starkie on Ev., 548; 5 Robinson's Practice, 60; 1st Chitty's Pleadings, 517 (16th Am. Ed.)

To a certain class of actions arising subsequent to the intestate's death, a different rule applies for obvious reasons.

Upon the appointment and qualification of an administrator, the personal property of the intestate by law vests in him. If, after his appointment, any such personal property should be converted by another, he may bring an action in trover at his election, either in his representative capacity, or in his individual character in his own right. In either case, upon general issue pleaded, in order to recover, he must show property in himself, which can only be done by the production of his letters of administration, or other competent evidence of his appointment. It is well understood that the plaintiff cannot succeed in this action, unless he proves: 1st, property in the thing converted, either general or special; 2nd, a wrongful conversion by the defendant; 3rd, his right to the possession of it, at the time of the conversion. *Stevenson v. Little*, 10 Mich. 439; *Davidson v. Waldron*, 31 Ill. 129; *Vanderburgh v. Bassett*, 4 Minn. 251.

It necessarily follows that for a conversion, *in his own time*, an administrator, to make out his case, must prove his representative character. It is a link in his chain of title. 1st Chitty's Pleading, 517.

It is equally true that when an administrator *declares* in ejectment upon his own seizing, to make out his case, it is essential for him to prove his appointment as administrator, as part of his title, although he need not declare as administrator. *Aldis v. Burdick*, 8 Vt. 21.

The plaintiff in ejectment, in the absence of statute, without proof that he was seized of the legal estate in the premises at the time of the alleged demise, must fail.

To the extent here indicated, and for the reasons above set forth, the text-books and cases cited by counsel in support of the doctrine there laid down 2 Starkie on Ev., 548; Redfield on Laws of Wills, 128, note; 1st Chitty's Pl., 517 (16th Am. Ed.); *Browning v. Huff*, 2 Bailey, 177; *Aldis, Ex. v. Burdick*, 8 Vt. 21; *Hunt v. Stevens*, 3 Taunt. 113; *Marsfield v. Marsh*, 2 L. R. 824; *Blainfield v. March*, 1 Salk. 285, and others, bearing a similitude to them in principle, go.

It will be observed that these authorities are confined to cases where the wrong or injury was done to the plaintiff, and *in which he could maintain a suit in his own name without designating himself as administrator*. The case under consideration does not belong to this class. *Necessarily*, under the statute the plaintiff must sue in his representative character. If he should not, the declaration would be demurrable. If the defendant had desired to challenge the appointment of the plaintiff as administrator, he might have interposed the plea of *ne unques administrator*. This plea would have put the plaintiff upon proof of his representative character. Having plead the general issue only, he thereby waived the production of the letters of administration at the trial, and admitted that plaintiff was authorized to bring the suit. But defendant strenuously contends that if the general issue does not require the plaintiff to prove his appointment, the plaintiff nevertheless chose to put that fact in issue by offering in evidence his letters, and that therefore the parties, by their implied agreement in open court, having tendered an issue as to the validity of the letters, the court must decide the point. This is a specious but mooted doctrine, and in the case of *Reynold's Executors v. Torrance*, 2 Brevard (S. C.), 484, it was denied by a majority of the court. If we were disposed to accept it (which we are not, as it raises an issue foreign to the record) it would not avail the defendant in this case.

Even had the plea of *ne unques administrator* been filed, we are of opinion that the plaintiff sufficiently proved his representative character to meet it. Letters of administration were offered and read in evidence. An exception was taken to the introduction of the letters on two grounds: first, because they purported on their face to be merely letters of administration to collect; and second, because an administrator is not a personal representative within the meaning of the statute upon which the action is founded. Upon examination of the letters read in evidence, they are found to be a literal transcript of the form prescribed by statute, with the blanks therein appropriately filled up. R. S. 1868, p. 655, § 46.

It is insisted that these are only letters of administration to collect for the reason that full thirty days had not elapsed subsequent to the death of the intestate prior to the appointment of the administrator. The law provides that if "the widow or other relative of the intestate" shall fail to apply within twenty days from the death of such intestate, the probate court may grant administration to any creditor or creditors who shall apply for the same within the ten day

next ensuing, and if no creditor applies within that time, administration may be granted to any person or persons whom the judge of probate may think will best manage the estate. R. S. 1868, p. 654, §44. The statute thus accords to the widow or next of kin, and to the creditors, the right of applying for administration in the order prescribed therein. The parties entitled to apply for administration may waive the right and the judge may thereupon appoint any fit person.

Whether they did in fact waive their right cannot be determined in this cause. In this collateral proceeding we may not inquire whether the letters were issued to a person entitled to them or not. As the judge of probate had competent jurisdiction of the cause the regularity of the administrator's appointment can only be questioned in a direct proceeding for that purpose. *Taylor v. Hosick*, 13 Kan. 527; *Sadler v. Sadler*, 16 Ark. 633; *Boody v. Emmerson*, 17 N. H. 577; *Emery v. Hildreth*, 2 Gray, 231; *Wight v. Wallbaum*, 39 Ill. 554; *Schnell v. City of Chicago*, 38 Ill. 389.

This disposes of the first objection, and as to the second, that the administrator is a personal representative within the intent of the statute, and authorized to bring the suit, it is too well settled to need the citation of authorities.

Other objections to the letters of administration are raised for the first time in this court. It is objected that they are neither signed by the probate judge nor tested in his name as required by law.

Section 42 of chapter 90, concerning "Wills, executors and administrators," R. S., p. 654, declares that all letters testamentary and of administration shall be under the seal of the court, and attested and signed as *other process*.

Section 47 of the same chapter, R. S., p. 655, provides that all letters of administration shall be tested and signed, as *other process*, in the name of the probate judge, and be issued under the seal of the court.

Section 15 of chapter 71, concerning "Probate Courts," R. S., p. 524, provides that letters of administration, writs, summonses, citations, subpoenas, and *all other process*, which may be made or issued by the judge of probate in the discharge of his duties * * * shall bear teste in the name of the probate judge, and be sealed with the seal of the said probate court.

It is apparent from the language of these sections that letters of administration are to be considered as *process*, issuing out of the probate court, within the meaning both of the act concerning "Wills,

executors and administrators," and the act concerning "Probate Courts," and that letters of administration are to be attested and signed in the same manner as all other process. Were these the only sections pertinent to the question under examination we would be bound to conclude that the letters read in evidence were not attested and signed as required by law. Until February 8, 1864 (R. S., p. 527), the probate judge of Arapahoe county acted as his own clerk, and necessarily issued and signed all process emanating from that court. No other person was authorized by law to do so. On March 11th, 1864 (R. S., p. 525), the legislature provided "that the county clerks of the several counties" (Arapahoe county being included) "named in the act" (except the county of Gilpin) "shall be *ex-officio* clerks of the said probate courts therein, and they shall perform the duties respecting the said probate courts, which are performed by the clerks of the district courts." The clerk of the district court is required by law to sign and teste in his name all process issuing out of that court (R. S., p. 500, § 1). Hence it results that it is the duty of the clerk of the probate court to sign and teste in his name all process issuing from that court. The next legislature extended the provisions of the said act of March 11th, 1864, to Arapahoe county (R. S., p. 529, § 51), and further provided (and 50, R. S., p. 529) that "it shall be lawful for the probate judge in the several counties to perform the duties imposed by the act to which this is amendatory, upon the county clerks, whenever they shall elect so to do." And further, that "*whenever* the probate judge shall perform the duties of the clerk of his court, all process issuing from such court shall be issued by, and in the name of, the clerk thereof." These last two sections, considered in connection with the other sections cited, make it manifest that it is the intention of the law that the probate judge should teste and sign process only when he elects to perform the duties which would otherwise devolve upon the clerk, and that in all other cases process shall be tested and signed by and in the name of the clerk. The sections above quoted were re-enacted in the Revised Statutes. Although other objections were urged, we fail to discover that the letters of administration were defective in any respect. If they were informal in any particular, this court would decline to reverse the judgment below on that ground. If of such informality, alleged for the first time in this court, the objections were valid, had they been raised in the court below, they might have been obviated by the introduction of other evidence of the appointment of the administrator. The production of the

is evidence but not the only evidence of the administrator's appointment. The appointment is a matter of record, and by the record, if necessary, it may be established. *The State v. Price*, 21 Mo. 434; *Browning v. Huff*, 2 Bailey (S. C.), 175; *Elden v. Keddel*, 8 East, 189.

The appellant objects that there can be no recovery without an allegation in the declaration and proof at the trial, that the wife was dependent on her husband for support. This doctrine is announced by the supreme court of Illinois, under a statute different in some substantial respects from ours. *Chicago & R. I. R. R. v. Morris*, 26 Ill. 400.

We fail to discover in our statute any warrant for saying that unless the widow in the life-time of her husband was necessitous, or dependent, she is not entitled to recover. The Territorial Supreme Court, at its last term, repudiated that theory as being untenable. Without regard to the needy condition of the widow, *cæteris paribus*, the measure of her damages is the same in each case. In the very carefully considered opinion just referred to, in the case of the *Kansas Pacific Railway Co. v. John Lundin, Administrator, etc.*, 3 Col. 94, the court holds that the recovery under this statute is not governed by the needs of the wife, and what she would be entitled to demand from the deceased if he had lived, but that the estimated accumulations of the deceased during the probable remainder of his life, if he had not come to an accidental death, having reference to his age, occupation, habits, bodily health and ability, furnish the true measure of compensatory damages; and further, that for determining the number of years he would probably have lived, reference may be had to the Carlisle and other approved tables.

With this opinion we are in full accord, and as the instructions of the court (except the proviso therein contained) touching the measure of damages, are almost an exact rescript of the opinion on that subject, we see no error in them in that respect. That there was error in the proviso "that his wife was dependent on him for support," cannot inure to the benefit of the appellant, as it could not possibly be prejudiced thereby.

The question of fact submitted to the jury under proper instructions was for them to resolve, and in view of the wildly conflicting evidence adduced at the trial, if an appellate court were to interfere with their finding, it would be an unwarranted encroachment upon the province of the jury.

Although a railroad company is not, in a strict sense, an insurer of its passengers, nevertheless its duty is to guard and protect

their lives by the exercise of the utmost care, diligence and vigilance consistent with the mode of transportation used, and the practical operation of the road. *Shearman & Redfield*, 266; *Tuller et al. v. Talbot*, 23 Ill. 361.

If a car is overturned, and a passenger in consequence is killed, a presumption arises that the casualty was the result of negligence. *Edgerton v. New York & Harlem R. R. Co.*, 39 N. Y. 228; *Yoakum v. Kinney*, 28 Ga. 111; *Pittsburg, Cincinnati & St. Louis R. W. Co. v. Thompson*, 56 Ill. 138; *Ware v. Gay*, 11 Pick. 106; *Wheeler v. Bolster*, 3 E. D. Smith, 327.

This presumption may be rebutted by the company, by showing that the accident itself was such that human prudence and foresight could not have guarded against it. *Shearman & Redfield* on §280 a.

That the accident occurred, and that it resulted in the death of James Smith, were not disputed; but the company sought to exonerate itself from liability by showing a state of facts from which the jury would be at liberty to infer that it (the company) is free from fault in the premises; that no negligence or want of care is to be imputed to it in the construction and keeping in repair of its switch. But the jury, by their verdict, have found that the switch was not properly constructed; that the accident resulted either from the rail (which was forced out of its place), being too short, or from the clamp of the main switch-bar being too loose to the end of said rail, or both. From the evidence they might have found either one or all of these facts. Had the defective rail been of proper length, or even had the clamp of the switch-bar, well designed to hold the rail at its proper place, not been too loose at the end of such rail, the effect of the wheels of the engine and cars striking against the end of the defective rail would have been to knock it out of the clamp of the main switch-bar and to move it with the standard. That the entire rail was too short by three inches, the jury may well have found from the evidence.

Williams, the appellant's witness, who was a brakeman on the road at the time of the accident, testified that the defective rail was always too short; that not thinking it was safe, three or four feet before the accident, he had forced the switch end of the rail to the end of the permanent connecting rail opposite, by driving a wedge between the remote end of the rail and the one to which it was connected. The attention of the section boss was called to this defect. His testimony to disprove that the clamp of the rail was

switch-bar was too near the end of the defective rail for safety. The accident, under proper instructions, which were given, with the latitude which is allowed a jury in the determination of the weight of evidence, and the credibility of witnesses a jury might find, would not have occurred had that care and diligence been exercised which the law demands in the construction and keeping in repair of switches and tracks. So contradictory is the evidence that a verdict for either party would not be wholly without support.

With the exception of the proviso to instruction numbered seven, before referred to, we see no error in any part of the charge to which the appellant excepted, and that error is harmless. The evidence of Mr. Greenslit as to the *usual* distance on other narrow-gauge roads, between the end of a movable switch and the end of the adjacent permanent rail, was properly excluded, if for no other reason, on the ground that no foundation had been laid for the question. It did not appear that he had any knowledge whether there was usually a uniform distance between such rails. Nor did the court err in excluding testimony as to the distance he had found, by an examination made recently before the trial, "between the ends of switches on the Denver & Rio Grande road." The question as to whether that particular company had defectively or properly constructed its switches was not before the court, and was not a legitimate subject of inquiry.

Other and competent testimony as to the proper distance between such rails was introduced by the appellant. The jury was not, therefore, unadvised on this subject.

We have carefully examined all the specifications of error contained in the appellant's assignment, and failing to discover any error that would warrant us in reversing the judgment of the court below, it must be affirmed (1).

SANDERSON v. FRAZIER.

Supreme Court, Colorado, December Term, 1884.

[Reported in 8 Colo. 79.]

STAGE COACH PROPRIETORS—CARRIERS OF PASSENGERS.—

The law governing the liability of stage coach proprietors as common carriers of passengers imposes upon such carriers the duty of providing

1. Petition for rehearing denied. Opinion in 4 Colo. 162, where the question of the statutory right to recover was fully discussed.

roadworthy vehicles suitable for the transportation of passengers, steady and manageable horses with strong and proper harness, and careful drivers of reasonable skill and good habits (1).

DUTY OF PASSENGERS.—It is the duty of passengers to comply with the reasonable regulations of the carrier, and to exercise proper care and diligence in avoiding injury to themselves, for the rule that one cannot recover for an injury caused by his own negligence, or where by his own fault he so far contributed thereto that but for such fault the injury would not have happened, is applicable to passengers in stage coaches.

OVERTURNING OF STAGE COACH—PASSENGER'S ARM OUT OF STAGE.—Where plaintiff, with two other passengers with him on the seat in defendant's stage coach, had his arm projecting outside the body of the stage, and the stage was overturned and the other passengers were thrown upon him and his arm was injured, it was held that plaintiff was not guilty of contributory negligence in having his arm projecting from the stage coach.

OVERTURNING OF STAGE COACH—PRESUMPTION OF NEGLIGENCE.—Where any damage or injury happens to a passenger by the breaking down or overturning of a stage coach, a *prima facie* case is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger, and that it was occasioned by the failure of some portion of the machinery, appliances or means provided for the transportation of passengers.

1. Among other actions in *Colorado* relating to injuries sustained by passengers in stage coaches, are the following:

In *MCCLELLAND et al. v. BURNS*, 5 Colo. 390 (1880), the complaint, which was sustained by the evidence, charged the defendants, their agents and servants, with negligence and careless and wanton disregard of their duties as carriers of passengers, in failing to provide a proper and sufficient coach, and good and sufficient horses, from Fairplay to Leadville, and in compelling plaintiff Burns with other passengers to ride in the open two-horse wagon; also in compelling plaintiff to walk up the mountain, and then driving away and leaving him on its summit, without any means of conveyance to Leadville or elsewhere, and without shelter from the severe storm which was raging. On the trial plaintiff

recovered judgment for \$500. Defendant appealed on the ground of the giving of erroneous instructions as to negligence, but the Supreme Court held there was no error and judgment was affirmed. The court (per BECK, J.) said: "When we look into the evidence and note the reckless and inhuman conduct of the driver of the wagon in deserting the plaintiff to his fate in that wild storm, and upon that bleak mountain, after requiring him to make his way on foot through the snow to its summit, there is little reason to apprehend that the jury may have based its verdict upon acts of negligence of appellants or their servant, which were not the proximate cause of the injury complained of."

In *WALL et al. v. LIVEZAY*, 6 Colo. 465 (1882), the substance of the complaint was that on the 22nd day of September, 1879, the defendants were

ERROR to District Court of Arapahoe County. The facts appear in the opinion. *Judgment affirmed.*

HUGH BUTLER, for plaintiff in error.

WELLS, SMITH & MACON, for defendant in error.

Stone, J.—The law governing the liability of stage coach proprietors as common carriers of passengers is quite well settled by juridical decisions of the highest courts.

The law imposes upon such carriers the duty of providing road-worthy vehicles suitable for the transportation of passengers, steady and manageable horses, with strong and proper harness, and careful drivers of reasonable skill and good habits. Although their undertaking is not one absolutely to convey safely—that is to say, while they do not warrant the safety of passengers at all events, yet their undertaking and liability go to this extent, that their means of transportation are suitable and sufficient, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty.

Respecting the measure of this care and diligence, considering that such carriage is charged with the lives, limbs and health of human beings, it has been held that passenger carriers bind themselves to carry safely those whom they take into their coaches, “as far as human care and foresight will go—that is, for the utmost care

partners under the name and style of Wall & Witter, and were common carriers of passengers by stage for hire from Red Hill station, on the Denver, South Park & Pacific Railroad to the city of Leadville. That on the day named they undertook to carry the plaintiff from said station to Leadville for the sum of \$8, which he paid, and that he was thereupon received upon their coach as a passenger. It set out the facts of the overturning of the coach at Red Hill, averring that the plaintiff received serious and permanent injuries, from which he has never recovered; his continued sickness and inability to attend to business, and that he was forced to expend the sum of \$500 for medical attendance and nursing, averring that the accident occurred through the carelessness and negli-

gence of the defendants. Damages were laid in the sum of \$10,000. There was a verdict for plaintiff for \$4,500 which, on appeal, was affirmed. The appeal was on the ground of erroneous instructions as to damages, etc.

RIO GRANDE WESTERN R'y Co. v. RUBENSTEIN, 5 Colo. App. 121, was an action for damages for injuries sustained by the plaintiff while riding in one of defendant's stage coaches. There was a verdict and judgment for plaintiff which, on appeal, was affirmed. *Sanderson v. Frazier*, 8 Colo. 79, 9 Am. Neg. Cas. 123, cited as to the rule that a passenger who shows he is being carried for hire and that the vehicle overturns and occasions him injury has made out a *prima facie* case.

and diligence of very cautious persons." Some cases even hold that such carriers are responsible "for any, even the slightest, neglect." This doctrine is laid down by the Supreme Court of the United States, in the case of *Stokes v. Saltonstall*, 13 Pet. 190 (1) which is regarded by the authorities as the leading case on the subject in the United States, and the same doctrine is stated: the law by Mr. Story in the text of his work on Bailments, §60. In support of the same rule as to liability in such cases are the following authorities: *Farish & Co. v. Reigle*, 11 Gratt. 697; *McLean v. Burbank*, 11 Minn. 277 (2); *Maury v. Talmadge*, 2 McLean, 15; *Peck and wife v. Neil*, 3 McLean, 23.

On the other hand, it is the duty of passengers to comply with the reasonable regulations of the carrier, and to exercise proper care and diligence in avoiding injury to themselves, for the reason that one cannot recover for an injury which has been caused by his own negligence, or where by his own fault he has so far contributed thereto that but for such fault on his part the injury would not have happened, is applicable to this class of passengers.

The appellee Frazier was a passenger in one of the stage coaches of appellants, running at that time between Cañon City and Ironton, Mo., and by the upsetting of the vehicle his arm was broken. The alleged negligence of the driver in causing the upset is the ground of action for the resultant injury. A question of contributory negligence on the part of the appellee was made by the findings in the court below, and one of the alleged errors relied upon by appellants in seeking to reverse the judgment is, that the verdict is contrary to the evidence and the law in respect to such a contributory negligence.

The act of appellee constituting the negligence complained of was in having his arm, at the time of the accident, "outside the coach."

The upset was caused by the wheel on one side of the coach striking on a rock at one side of the road, whereby the coach was thrown over upon the opposite side. This portion of the road was in a cañon in a mountainous part of the journey. It was dark at night; there was no light on that side of the stage which struck the rock. But the driver testified that it was not so dark but that he was able to see the rock just before striking it. The appellee was sitting on the end of the seat on the opposite side; there were two

1. *Stokes v. Saltonstall*, 13 Pet. 190, is reported in 7 Am. Neg. Cas. 297.

2. *McLean v. Burbank*, 11 Minn. 277, is reported in 4 Am. Neg. Cas. 199.

passengers in the same seat which crowded appellee close to the side; he had his arm either resting on the rail, or projecting outside the body of the stage, so that when overturned the other passengers in the same seat were thrown down upon him; his arm was caught under some portion of the vehicle and broken, and he was unable to be extricated until the other passengers had got out and lifted up the stage. Upon this state of facts it is contended by counsel for appellants that appellee was chargeable with such contributory negligence as ought to bar a recovery. In support of this contention, the case of *P. & C. R. R. Co. v. McClurg*, 56 Pa. St. 294, is cited, where a passenger, by reason of the protrusion of his arm from the window of the car in which he was riding, was injured by the arm coming in contact with another car standing on a switch; and the court held, and, as we think, correctly, that where such passenger "puts his elbow or arm out of the window voluntarily, without any qualifying circumstances impelling him to do it, it is negligence *in se*; and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law."

There is a wide difference, however, between such a case and the one before us. Railway coaches pass along an undeviating track and often within a few inches of a signal post, switch bars, cattle guards, bridge timbers and cars upon side tracks, rendering it dangerous for passengers to expose any portion of the body beyond the outer line of the coaches, which themselves project beyond the wheels and the track. But stage coaches do not in this particular differ from other road vehicles, the wheels of which project laterally beyond the body of the vehicle, which circumstance, in connection with the different character of the roadway and mode of transportation, is an immunity against danger from the mere projection of an arm outside the window or beyond the line of the body of such vehicle. In the case of an injury like that in the railway case cited, the projection of the arm outside the window is the cause of the resultant injury. In the case of the overturning of the stage of appellants by running upon a rock, the position of appellee's arm was no more a cause of the upset which produced the injury than the position of the arms of the other passengers or of the hat upon his head. Besides, the evidence in the record shows that the vehicle in question was not a regular or ordinary stage coach with windows, but a Concord mail wagon or canvas back known as a "Jerky," without windows, but having a canvas cover with canvas side curtains, supported by wooden standards at the sides and bows

overhead. The appellee, crowded as he was against the side, with three passengers on the seat, would naturally, and we may say unavoidably, thrust out his arm when the vehicle was overturned, falling as he did, beneath the weight of the other passengers, and with no wall or coach body to protect him. The curtains even were rolled up at the time. Under the circumstances the injury to appellee was an almost inevitable result of the overturning of the vehicle; and the fact that his arm was at the time outside the rail or outer edge of the wagon bed cannot be imputed as negligence or want of due care on his part as passenger.

Another ground of error is that the court permitted evidence that one of the lamps of the stage—the one on the side which collided with the rock—was not lighted at the time of the accident. There was no error in this. It was a circumstance which, in connection with all the others, tended to show negligence on the part of appellants. The driver testified that it was a starlight night and he was able to see the road track, the wheel and the rock just before he struck it, and that the light would not have assisted him. But this testimony does not render improper the evidence previously admitted in making the case for appellee, showing, at least *prima facie*, a want of due care. In the case of *Crofts v. Waterhouse*, 3 Bing. 321 (1), Best, Ch. J., says: "The coachman must have competent skill and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." This is certainly strong language, but does not appear to be against the weight of authority in stating the general rules governing in such cases.

1. In *CROFTS v. WATERHOUSE*, 3 Bing. 319, the driver of a stage coach gathered a bank, and upset the coach. He had passed the spot where the accident happened twelve hours before, but in the interval a landmark had been removed. In an action for an injury sustained by this accident, the judge told the jury that as there was no obstruction in the road, the driver ought to have kept

within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict; and a verdict having been returned accordingly, the court granted a new trial on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence.

Counsel for appellants contend for the rule that the burden of proof is on the plaintiff in such cases not only to show negligence on the part of defendant, but ordinary care on his own part. An examination of the cases will clearly show that a different rule is established by the great weight of authority. Mr. Story lays down the rule as follows: "Where any damage or injury happens to the passenger by the breaking down or overturning of the coach, or by any other accident occurring on the road, the presumption *prima facie* is that it occurred by the negligence of the coachman, and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatever; and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent." Story on Bailments, §601 a. Our own court in the case of Wall et al. v. Livezey, 6 Colo. 465 (1), declared the rule in the following language, used by Chief Justice Beck: "A *prima facie* case, however, is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger, and that it was occasioned by the failure of some portion of the machinery, appliances or means provided for the transportation of the passengers. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further and show the particular defect or cause of the accident, until the presumption is rebutted. It devolves upon the carrier to rebut this presumption by evidence that he exercised the greatest degree of diligence practicable under the circumstances." In the case of Stokes v. Saltonstall, *supra*, it is held by the Supreme Court of the United States that in such action the facts that the coach was upset, and the plaintiff injured, are sufficient *prima facie* evidence of negligence or want of skill of the driver, and shift the burden of proof upon the defendant to show that the driver was in every respect qualified, and acted with reasonable skill and the utmost caution; and if the disaster was occasioned by the least want of due skill or of prudence on his part, the defendant was answerable. The same rule substantially is held to be the law in the cases of Farish & Co. v. Reigle, and McLean v. Burbank, hereinbefore cited. Upon the question of negligence on the part of appellants, the evidence shows that at a station where the stage stopped before the accident, the driver discovered that there were no lanterns on the stage; that he called for two lamps; that the superintendent brought

1. See note of this case in 9 Am. Neg. Cas. 124, *ante*.

two, and put on, but that one was out of repair, and so was not lighted; that at the place of the accident, the road was level and slightly up-grade; that the rock was a foot and a half or two feet outside the track of the roadway; that there was a gully on the opposite side, the distance being about twelve or thirteen feet between the rock on one side, and the gully on the other, and the width of the vehicle between the outside of the hubs about seven feet; that the driver knew the place well because the gully had been made by a washout, and that he slackened his speed at that point.

Under these facts, the question was properly submitted to the jury by instructions, whether the accident might not have been avoided by the exercise of due care on the part of the agents of appellants; or, in other words, whether the injury to appellee was not caused by the negligence of appellants in not using the means clearly within their power and control to have prevented the upset.

Some testimony was admitted, over the objection of appellants, touching the manner and character of the driving of the stage before and after the accident in question. We do not think this was unwarranted. It related to the driver's knowledge of the road and his skill in his employment, and for this purpose was not impertinent, although incompetent to prove his conduct in this particular instance in producing the accident. The want of skill of the driver may be shown at the time of the accident or at any prior time; but his good or bad conduct can only be looked at, at the time the accident occurred, or as connected with the accident. *Peck and wife v. Neil*, 3 McLean, 24. And evidence that some distance further on the road, the same night, the driver got outside the road and into a gully made by a recent washout, and that the passengers had to get out and assist in extricating the stage and team, and getting them back on the road, was admissible for the purpose of showing the degree of darkness of the night, the character and condition of the road, and the consequent necessity for proper lights on the vehicle. We have examined with care the instructions given by the court, and those refused, upon which errors are assigned, and, guided by the rules and principles of law herein laid down as applicable to the facts of the case, we cannot find that the errors contended for are well assigned.

As to the ground for new trial, that the verdict was excessive, we need only say, in the language of nearly all the decisions upon this point, that there is no rule of law fixing the exact measure of damages in such a case; it cannot be reached by any process of

certain computation. The judgment of the jury as to what is a proper and just compensation in such cases must govern, unless the damages awarded are so obviously disproportionate to the injury shown to be sustained, as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case.

Upon the testimony of the appellee and the other witnesses, including the physicians who were examined respecting the disabled condition of appellee's arm at the time of the trial, which was eight or nine months after the accident, we do not think that the verdict of \$2,500 was so disproportionate to the loss, expense and injury shown, as to warrant its being considered excessive compensation.

Of the thirty-eight assignments of error in this case, we have reviewed herein only those which are chiefly discussed by counsel in their briefs, and which appear to be relied upon by appellants for reversal, and perceiving no material error in the record, the judgment will be affirmed.

Affirmed.

PULLMAN PALACE CAR COMPANY v. BARKER.

Supreme Court, Colorado, December Term, 1878.

[Reported in 4 Colo. 344.]

REMOTE AND PROXIMATE CAUSE.—While the law, out of regard for human life and safety, exacts from the carriers of passengers the utmost care and skill, it refuses to take into consideration damage remotely resulting from a breach of their contract or neglect of their duty. The maxim is *causa proxima, non remota spectatur*.

FIRE ON SLEEPING CAR—PASSENGER SICK FROM EXPOSURE—PROXIMATE CAUSE.—Where the sleeping car of the defendant caught fire in the night and plaintiff, a woman, left the burning car with but slight clothing and in her stocking feet, the imminence of danger preventing her properly clothing herself, and in passing to the next car plaintiff was compelled to stand for a minute or two on the platform, it being an extremely cold night, and by reason of such exposure caught a severe cold resulting in a long period of illness, and the evidence showed that her illness was of such character as results from arrested menstruation, it was *held* that plaintiff's subsequent long illness was not the result of the exposure, but the result of the exposure in her then condition, and such illness was the remote and not the proximate result of defendant's negligence.

SICK PASSENGERS.—Persons who are ill have a right to enter the cars of a railroad company and travel therein; as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions affecting their fitness to journey, certainly where they are unknown to the carrier, must rest upon their own shoulders.

APPEAL from District Court of Arapahoe County. The facts appear in the opinion. *Judgment* for the plaintiff for \$1,480 *reversed*.

BUTLER & WRIGHT, for appellant.

SYMES & DECKER, for appellee.

Elbert, J.—This was an action on the case brought by Diana Barker against the appellant, for injuries sustained by reason of alleged negligence (1).

The controversy, as presented by the record, respects the *extent* not the fact of the appellant's liability. While the law, out of regard for human life and safety, exacts from the carriers of passengers

1. *Passenger rendered insane from shock received in derailment of train.*—**KELLEY (ADM'X)**, *v. UNION PACIFIC R'Y CO.*, 16 Colo. 455 (1891), was an action for damages for injuries sustained by plaintiff's intestate, who was an expressman in the employ of the Pacific Express Co., but travelling by contract between his employers and the defendant railway company, as a passenger on defendant's train. The injuries were caused by the car, on which was plaintiff's intestate, becoming derailed whereby the same ran down a steep grade and the shock produced insanity. The intestate subsequently died in the insane asylum, but not from the injuries caused by the negligence for which the action was brought. Defendant's demurrer to the complaint that the same did not show any right in the administratrix to bring action was sustained and judgment rendered for defendant. Plaintiff brought the case to the supreme court by writ of error. The court held that the complaint and the matters therein stated were sufficient in law and it was error to sustain demurrer, damages being re-

coverable by the administratrix. Judgment reversed.

On the subsequent trial of the action there was a verdict and judgment for plaintiff for \$1,999. On appeal judgment was affirmed. **UNION PACIFIC R'Y CO. v. KELLEY**, 4 Colo. App. 325 (1894).

Dangerous position on car—Passenger killed by falling from train.—

In **JACKSON (REC'R) v. CRILLY**, 16 Colo. 103 (1891), it was held that a passenger on an excursion train, who seats himself on the rear end of the box of an open car, the end board not exceeding two and one-half inches in thickness, with his feet elevated by being placed on the seat directly in front of him, and with no possible opportunity of protecting himself in case of the sudden jolt of the car, when he might have found a safe seat in an adjoining car or stood up in the car in question, is guilty of contributory negligence as matter of law; and in an action for his death caused by falling from his seat while the train was in motion, it was error to submit the question of contributory negligence to the jury. Judgment for plaintiff reversed.

the utmost care and skill, it refuses to take into consideration damage remotely resulting from a breach of their contract or neglect of their duty. The maxim is *causa proxima, non remota spectatur*.

In cases of contract as well as of tort, where no question arises of fraud, malice or oppression, the loss or injury for which compensation is sought must be the natural and proximate consequence of the alleged breach or wrongful act. Sedgwick's Measure of Dam., 57 et seq.; Shearman and Redfield on Neg., §595 et seq.

What is the proximate cause of an injury in a legal sense is often an embarrassing question, involved in metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life.

The proximateness required is not the greatest possible; the negligence to which the responsibility attaches may sometimes concur with or precede other agencies in producing an injury. A result may be physically, secondary and consequential, and yet in legal contemplation be proximate. As a consequence the rule is vague and of different application. As said by Bramwell, B., "it is sometimes like having to draw a line between night and day; there is a duration of twilight when it is neither night nor day." Each case of this description must be decided with reference to the circumstances peculiar to it.

The question as presented in the case at bar is not without difficulty.

The sleeping car of the appellant caught fire in the night and was burning, through the negligence of its employees; the appellee, with her husband, occupied a berth which the flames had already reached, when she was awakened. The suddenness of the alarm and the imminency of the danger from the smoke and approaching flames, left no time for the appellee to properly clothe herself; she left the burning car with but slight clothing, and in her stocking feet; in passing to the next car she was compelled to stand for a minute or two on the platform of the car; it was an extremely cold night in January, and by reason of this exposure she caught a severe cold which caused the cessation of her menses, and resulted in a long period of illness.

Was this illness, in legal contemplation, the proximate result of the negligence of the appellant, for which the appellee may rightfully demand compensation?

In the case of Milwaukee, etc., Railway Co. v. Kellogg, 4 Otto, 475, Mr. Justice Strong says: "The question always is, was there an unbroken connection between the wrongful act and the injury—

a continuous operation? Did the fact constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in order to warrant a finding that negligence or an act not amounting to a wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of a sufferer must be to the originator of the intermediate cause. * * * The inquiry must therefore always be whether there was any intermediate cause disconnected with the primary fact and self operating, which produced the injury."

The long illness of the appellee, as shown by the evidence, was of such character as results from arrested menstruation. Independent of the fact that she was "unwell" at the time, it cannot be said that the negligence of the appellant resulted in her long illness or any illness. Conceding that the appellee was compelled on account of the smoke and flames to leave the car in the half-clad condition she did, the exposure to the cold was the direct and necessary result of the appellant's negligence. Her subsequent illness, however, was not the result of the exposure, but the result of the exposure *in her then condition*. Here, then, intervenes an independent cause of her illness, a cause resting in her physical condition, appertaining exclusively to herself, with which the appellant had no concern, and to which it sustained no relations either by contract or by the general duty imposed by law upon carriers of passengers. Where physical weakness or disability is apparent to, or is brought to the attention of the carrier, undoubtedly that high degree of care which the law imposes upon him, would, under certain circumstances, involve duties in reference thereto. As that he shall allow an aged, infirm, or crippled person, a reasonable time in which to get on or off the coach or car, having reference to their crippled or infirm condition. *Colt v. Sixth Ave. R. R. Co.*, 33 Super. Court (N. Y.) 190 (1).

1. *Colt v. Sixth Ave. R. R. Co.*, 33 Super. Ct. (N. Y.) 190, affirmed in 49 N. Y. 671, is reported in 5 Am. Neg. Cas. 170.

While this is the case it cannot be said that the law imposes any duty respecting the possible secret complaints and diseases of passengers affecting their fitness to travel. Where no duty is imposed, no liability can attach. Another passenger might have suffered equally serious consequences from the effect of the cold upon a wound in the foot, superinducing inflammation, and possibly necessitating amputation. Can it be said that the law imposed upon the carrier an enlarged duty having reference to the wound, and that the added risk of travelling in this condition must be assumed by him and not by the passenger from whose personal condition it springs? We think not. While it is true that menstruation is a law of health, it is also true that it is a condition requiring greater care and prudence to avoid exposure.

"The cars of a railroad company are not hospitals, nor their employees nurses." Persons who are ill have a right to enter the cars of a railroad company and travel therein; as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions affecting their fitness to journey, certainly where they are unknown to the carrier, must rest upon their own shoulders. *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 613; *Hobbs v. The London, etc., R. Co.*, 10 Law Rep. (Q. B.) 111 (1).

The illness of the appellee, as shown by the evidence, was traceable to her physical condition at the time of the accident, and was not the subject-matter of damage. It was a remote, and not a natural or proximate result of the appellant's negligence.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Reversed.

1. In *HOBBS v. LONDON & SOUTH-WESTERN RAILWAY COMPANY*, 10 L. R., Q. B. 111, it appeared that a husband took tickets at Wimbledon for himself, wife, and two children of five and seven years of age respectively, to go to Hampton Court station by the last train at night; by the negligence of the porters they were put into the wrong train and carried to Esher; being unable to obtain accommodation for the night at Esher, or a conveyance,

they walked home, a distance of between four and five miles, and the night being wet the wife caught cold and medical expenses were incurred:—Held, that the husband was entitled to recover damages in respect of the inconvenience suffered by being compelled to walk home, but that the illness of the wife was a consequence too remote from the breach of contract for damages to be recoverable for it.

HALL V. THE CONNECTICUT RIVER STEAM-BOAT COMPANY⁽¹⁾.

Supreme Court of Errors, Connecticut, July, 1839.

[Reported in 13 Conn. 319.]

DEPOSITION.—A deposition taken *ex parte* being offered in evidence, it appeared that the witness was incompetent by reason of interest, unless his competency was restored by a discharge; that a discharge was made and signed by the party offering the deposition, bearing the same date and appended thereto; and the witness testified in his deposition that he had been discharged before he testified; but it was not otherwise shown when the discharge was made, or that it had ever been delivered to the witness. *Held*, that such deposition was inadmissible.

EVIDENCE—INTERESTED WITNESS.—Though where the interest of a witness appears from his testimony alone, it may be further shown by him that such interest has been removed; yet where his interest is admitted, or is proved by other witnesses, his testimony is no more admissible to show a restoration of his competency than as evidence in chief.

PASSENGER STRUCK BY APPLIANCE ON BOAT AND FALLING OVERBOARD—EVIDENCE.—Where the plaintiff, a passenger in a steamboat from Hartford to New York, in an action against the owners for injuries sustained by him through the negligence of the master, having proved that, on the arrival of the boat in the dock at New York, the chain-box used to keep the boat in trim, was so insufficiently secured that it rolled across the deck, and striking against the plaintiff threw him overboard, whereby one of his legs was broken, and his body bruised, offered further evidence to prove that after he was taken from the water, and while sitting upon the wharf he applied to the master for some of his men to assist him into a carriage, who refused, saying that he had enough for his men to do on board; it was *held* that such evidence was admissible, 1, because such conduct of the master was part of the transaction in question; and 2, because the evidence was proper for the purpose of showing the damage sustained.

CARRIERS.—A carrier of passengers is bound to use the highest degree of care that a reasonable man would use.

ACTION on the case against the defendants, as owners of the steamer Bunker Hill, and carriers for hire between Hartford and New York, for injuries sustained by the plaintiff, a passenger on board such steamboat, through the want of proper care in the servant of the defendants. *Judgment affirmed.*

1. Cited in *DERWORT v. LOOMER*, 21 Conn. 244, 9 Am. Neg. Cas. 142, *post*.

The cause was tried at Norwich, March term, 1839, before Bissell, J.

On the trial, the defendants offered in evidence the deposition of George Barber, who, it was admitted, was interested in the event of the suit, and an incompetent witness, unless his interest was removed, and his competency restored, by a discharge from the defendants. The deposition was taken in the city of Hartford, on the 25th of March, 1839, in the absence of the plaintiff, who had no notice to be present. The discharge was dated the same day, and was appended to the deposition; and the witness swore in his deposition, that it was executed before he testified, but there was no other proof of this fact, or that it was then in his possession. The court, on an objection taken by the plaintiff, decided, that this evidence was not sufficient to prove that the witness was discharged when he testified, and on that ground rejected the deposition.

Thomas B. Sanford was captain of the steamboat Bunker Hill, and had charge of her for the defendants, at the time of the injury complained of. The plaintiff introduced evidence to prove that when the boat arrived at the dock at Peck Slip, in the city of New York, the chain-box, which was used on her deck, to keep her in trim, was so insufficiently secured, that it rolled across the deck, and, striking against the plaintiff, dashed him into the water, by which means one of his legs was broken, and his body much bruised. He then offered further evidence to prove that after he had been taken from the dock and while sitting on the wharf, he applied to Capt. Sanford to allow some of his men to assist him into a carriage, who replied that he had enough for his men to do on board, and otherwise treated him in a contemptuous and inhuman manner. To the admission of this evidence the defendants objected; but the court suffered it to go to the jury.

The court instructed the jury, that the defendants having received the plaintiff on board their boat, as stated in the declaration, they were bound to employ ordinary care and diligence in conveying him safely; that by ordinary care, in this case, they were to understand the highest degree of care which a reasonable man would use; and that if the chain-box was not secured in a reasonable manner, and the plaintiff had thereby sustained the injury complained of, he was entitled to recover.

The jury returned a verdict for the plaintiff; and the defendants moved for a new trial.

GODDARD & W. P. CLEVELAND, JUN., for the motion.

STRONG & CHILD, against the motion.

Waite, J.—1. It was conceded that the witness whose deposition was offered was interested in the event of the suit, and his testimony inadmissible, unless his interest had been removed by a discharge. The burden of proving that removal prior to the taking of the deposition, devolved upon the defendants. This was not done by the production of a discharge bearing the same date with the deposition. It was equally uncertain whether the discharge was executed before the deposition, or afterwards. The defendants, therefore, failed to prove that which it was incumbent on them to do, before they had a right to have the deposition read.

The principle that governs in the present case, has been repeatedly recognized by this court. Thus, where a witness introduced by the plaintiff, in an action of slander, to prove the speaking of the words, was unable to say whether the words were spoken before or after the commencement of the suit, his testimony was held to be inadmissible. *Scovell v. Kingsley*, 7 Conn. 284. So where a witness called by the plaintiff to prove a conversation with the defendant, being inquired of, upon cross-examination, whether the defendant did not make certain other declarations, replied that he did, either in that conversation, or in some other subsequent one, and in which he could not tell; the latter declarations were holden inadmissible. *Robinson et al. v. Ferry et al.*, 11 Conn. 460.

But it is said that the discharge was appended to the deposition by the magistrate, and that circumstance furnishes presumptive evidence that the discharge preceded the deposition. But no such presumption fairly arises. It was no part of the magistrate's duty to annex the discharge. His reason for doing it does not appear. He may have done so, because he was requested to do it, by the party employing him. For aught that appears, the release may never have gone into the possession of the witness. It was in the possession of the defendants at the trial, and produced by them in court; and there was no sufficient evidence that they had ever parted with it, except to the magistrate, for the purpose of having it enclosed in the deposition. The deposition of a witness originally interested in the event of the suit, taken *ex parte*, is entitled to no extraordinary presumptions in its favor.

Again, it is said, that the witness testified in his deposition that he had been discharged before giving his testimony. In the first place, it is a sufficient answer to this claim, that this fact does not appear from the motion. If it did, it would not avail the defendants.

If the interest of the witness appears from his testimony alone, it may be further shown by him that his interest has been removed. But where his interest is admitted, or is proved, by other witnesses, his testimony is inadmissible for any purpose, either as evidence in chief, or to show his own competency.

2. With respect to the testimony relative to what took place while the plaintiff lay upon the wharf, it may be fairly inferred from the motion, that it was a part of the transaction, at the time the injury was received. The plaintiff was thrown overboard from the steamboat; was taken out of the water and placed upon the wharf; and while lying there, with his leg broken, applied to the captain for men to assist him in getting into a carriage. It was competent for the plaintiff to prove the whole transaction. The refusal of the master to render any assistance was given while he was acting in the employment of the defendants, and within the scope of his authority.

But if this were not so, we think the admission of the evidence justifiable upon another ground. It was admissible to show the damage which the plaintiff had sustained. Suppose the boat had arrived at New York in the night, which is not unusual, and the plaintiff, after having been thrown overboard in the manner he was, had been taken from the water, cold, wet, and wounded, and in consequence of the captain's refusal to render him any assistance, had been left in that situation upon the wharf, for hours, before he could procure any other assistance; might not all that be shown for the purpose of proving the damages? In a recent case before the court of King's Bench in England, brought against the proprietor of a stage coach for negligence, it appeared that the plaintiff, while travelling on the coach, had been thrown off, and had her leg broken. The injury was received in the county of Oxford, where she remained a considerable time; but before she fully recovered, she removed to her home in the county of Warwick, and there required further medical attendance. The venue was laid in the latter county; and one question was, whether those facts supported the plaintiff's undertaking to give material evidence of some matter in issue arising in that county, so as to prevent a change to the other county. Lord Tenterden said, the inconvenience suffered and expense incurred in Warwickshire, were a damage to the plaintiff, the consequence of a wrongful act of the defendant; and there was, therefore, a matter in issue arising in the county of Warwick, within the mean-

ing of the undertaking. *Curtis et ux. v. Drinkwater*, 2 Barn. & Adol. 164 (1).

In this case, the necessity of calling for assistance arose from the wrongful conduct of the defendants. The delay and inconvenience upon the wharf was as material as the inconvenience and expense incurred in Warwickshire, in the case cited.

Whether in consequence of the wound which the plaintiff had received, through the carelessness of the defendants, they were not bound to do something more than merely place him upon a wharf, and there abandon him, without the power of removing himself;—whether under such circumstances, the law does not require them to go farther, and do what is reasonable and necessary to place him in a situation where he might be taken care of; we do not think it necessary to determine. One thing, however, is certain; if the law does not require it, humanity does; and before we could sanction as law, a doctrine so contrary to the dictates of humanity, we should require satisfactory reasons in support of it.

But the ground of the defendant's objection to the testimony is not stated in the motion. The rule, in such case, is, that if it was admissible for any purpose, a new trial will not be granted. And, as we are satisfied, that the evidence was admissible as a part of the *res gestæ*, and also for the purpose of showing the damages, we deem it unnecessary to go farther.

3. It is also said, that the charge was incorrect, as it imposed upon the defendants a greater degree of care than the law required. It is a settled rule, that common carriers of goods for hire, are liable for all losses, except such as arise from the act of God, the enemies of the State, or the default of the party sending them. *Williams et al. v. Grant et al.*, 1 Conn. 487. This rule, though one of great rigor is founded upon public convenience and policy. It has, however

1. In *CURTIS v. DRINKWATER*, 2 B. & Ad. 164, 169, an action against a coach proprietor for negligence, it appeared that the plaintiff became an outside passenger; that there was luggage on the roof of the coach; and no iron railing between the luggage and passengers; and that the plaintiff, being seated with her back to the luggage, was, by a sudden jolt, thrown from the coach, and her leg was thereby broken. The judge

directed the jury to find for the plaintiff, if of opinion that the injury sustained was occasioned by the negligence of the defendant. The jury found for the plaintiff, and stated that they so found on account of the improper construction of the coach and of the luggage being on the seat: Held, that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence.

not been applied, in its fullest extent, to carriers of persons, because they have not the same absolute control over passengers that they have over goods entrusted to their care. *Boyce v. Anderson*, 2 Peters, 150; *Aston v. Heaven et al.*, 2 Esp. 533 (1). Yet both policy and the authority of adjudged cases require great care and skillful management in the transportation of passengers by common carriers. It is right that it should be so; that those upon whose skill and careful management not unfrequently depend the lives and safety of others, should feel themselves responsible for any want of care or faithfulness. The instruction given to the jury that the defendants were bound to employ the highest degree of care that a reasonable man would use, in our opinion, is fully supported upon principle and by authority. Thus, in a case where the iron axletree of a coach of the defendant, a common carrier, broke, and in consequence, the plaintiff was thrown from the coach, and his limbs fractured, the defendant was subjected, although the maker of the coach, which was an old one, testified that the vehicle was made of the best materials. Alderson, J., said, "that a coach proprietor was liable for all defects in his vehicle, which can be seen at the time of the construction, as well as for such as may exist afterwards, and be discovered on investigation; and if he were not responsible, he might buy ill-constructed or unsafe vehicles, and his passengers be without remedy." *Sharp v. Gray*, 9 Bing. 457 (2). So Eyre, Ch. J., speaking of the liability of the proprietor of a stage coach, remarked that the driver was answerable for the smallest negligence. *Aston v. Heaven et al.*, 2 Esp. 533 (*supra*).

But this subject has recently undergone an examination before the Supreme Court of the United States. *Stokes v. Saltonstall*, 13 Peters, 181 (3). There, the wife of the defendant in error was greatly injured, by the upsetting of a stage coach in which she was riding, the driver being intoxicated at the time. The Circuit Court instructed the jury, that if the disaster was occasioned by the least negligence or want of skill or prudence on the part of the driver, the owner of the coach was liable. The Supreme Court, upon a writ of error

1. In *ASTON v. HEAVEN*, 2 Esp. 533, it was held that coach-owners are not liable for injuries happening to passengers from accident or misfortune, where there has been no negligence or default in the driver.

2. In *SHARP v. GRAY*, 9 Bing. 457, it was held that if an accident

happens from a defect in the original construction, the proprietor is liable, although the defect is out of sight, and not discoverable upon ordinary examination.

3. Reported in 7 Am. Neg. Cas. 297.

brought by Stokes, the owner of the coach, say that the Circuit Court "laid down the law correctly;—that although a carrier of passengers does not warrant their safety at all events, yet his undertaking and liability as to them go to this extent; that he, or his agent, if he acts by one, shall possess competent skill; and that as far as human care and foresight can go, he will transport them safely."

Our advice therefore is, that no new trial be granted.

DERWORT V. LOOMER.

Supreme Court of Errors, Connecticut, July, 1851.

[Reported in 21 Conn. 244.]

VERDICT.—The court is reluctant, at all times, to set aside the verdict of a jury, because they have erred in weighing evidence; nor will the court feel at liberty to do this, where the jury have passed upon a mere question of fact, unless the verdict is so palpably against the evidence as to show that their minds were not open to reason and conviction, or that an improper influence was brought to bear on their deliberations.

OVERTURNING OF STAGE COACH—SETTING ASIDE VERDICT.

—But where the action was for injuries to the plaintiff, by the overturning of a stage coach in which she was a passenger, resulting from the negligence of the defendant's agent; and from the undisputed facts in the case, the court could see, that there was culpable negligence in the defendant's agent; the defense rested, not only upon the absence of such negligence, but a settlement and discharge, by the plaintiff's attorney, whose authority was denied; and both issues being submitted to the jury upon the evidence, they gave a verdict for the defendant, it was held, that the jury must have proceeded upon false notions of law, and as, in the opinion of the court, the verdict was against the evidence, on both grounds, a new trial was granted.

NEGLIGENCE—QUESTION OF LAW AND FACT.—In such cases, legal negligence is not a pure question of fact for the jury, but is mixed up with principles of law, so that its determination involves a conclusion of law, or more properly, a rule of responsibility, to be applied by the court.

CARRIERS OF PASSENGERS.—In the case of common carriers of passengers, the highest degree of care, which a reasonable man would use, is required by law. This rule applies alike to the character of the vehicle, the horses and harness, the skill and sobriety of the driver, his watchfulness, and his conduct, under every emergency or difficulty.

SAME.—The contract to carry passengers differs from that to carry freight, only in this, that in the latter case the carrier is responsible at all events, except for the act of God and the public enemy.

LIMITING LIABILITY.—Public notice given by a carrier, that he will not

be responsible for freight, or that it is at the risk of the owner, will not vary the carrier's liability.

PASSENGERS AND FREIGHT.—Nor will the custom of stage proprietors and their drivers to load down the vehicle with passengers and freight to its utmost capacity, regardless of the state of the roads, exonerate them from liability.

FREIGHT ON STAGE COACHES.—The practice of converting stage coaches into freight wagons, to transport iron, and almost everything else, is an innovation upon the rights of the travelling community, which the court will not sanction or countenance.

ATTORNEY—SETTLEMENT OF SUIT.—An attorney, employed to commence and prosecute a suit, but not otherwise authorized, has no power to settle that suit, and discharge the defendant from the plaintiff's claim.

ACTION on the case, for injuries sustained by Marion Derwort, one of the plaintiffs, and wife of George H. Derwort, the other plaintiff, in consequence of the overturning of a stage coach, owned by the defendant, and used by him for the conveyance of passengers for hire, from Bridgeport to Derby. *Reversed.*

The declaration, after alleging that the defendant received said Marion as a passenger, to be conveyed safely in his stage coach, from Bridgeport to Derby, for a certain reward, averred that the defendant, not regarding his duty, did not use proper care, but neglected so to do, and suffered a large quantity of iron, to wit, one ton of iron, and divers other ponderous articles, to be deposited on the top of said coach; and did permit said coach to be greatly overloaded; and did permit said coach to be driven in and over an unsafe and unusual part of the road, from said Bridgeport to said Derby, so that, by means of said iron being deposited on said coach as aforesaid, and by reason of said coach being overloaded, and also by reason of the coach being driven upon and over an unsafe and unusual part of said highway, by the defendant, and while said coach was proceeding with said Marion therein, in and along the public highway from Bridgeport to Derby, and before the arrival of the same at Derby, the coach was overturned; by means whereof, one of the arms of said Marion was broken and she was otherwise greatly bruised, wounded and injured, and became sick, sore, lame and disordered and has so continued to the present time.

The defendant pleaded, 1, the general issue; 2, a release and discharge of the defendant, by Henry T. Huggins, Esq., the attorney of the plaintiffs, in consideration of the sum of \$350, paid by him, to said George H. Derwort; which sum the latter accepted and

received of the defendant, in full satisfaction and discharge of the grievances alleged.

On these issues the cause was tried, at New Haven, January term, 1851.

From the whole testimony the following facts were proved with little or no discrepancy. On the 13th of February, 1849, the plaintiffs took passage at Bridgeport, in a stage sleigh, owned by the defendant, and driven by James Bradley, from that city to Birmingham, in the town of Derby. There were eleven passengers, exclusive of two children of the plaintiffs, their luggage, and a quantity of iron, (upwards of 400 pounds) on the top, projecting before and behind. After going between one or two miles from Bridgeport, northerly, towards Birmingham, the sleigh passed into a deep cut, where the snow was blown in; the sleigh being on double sets of runners, the fore-runners went steady, while the hind runners slid round, and the vehicle, with its contents, turned over. Mrs. Derwort's arm was broken, and she was otherwise bruised and injured. This was, in some degree, a dangerous place. On the west bank of the road, the snow was deep; on the right, there was a hollow or gutter. On the question of *negligence* in the driver, in this instance, the testimony was various, and somewhat discordant, but that he had experience in this business, was of good habits and generally careful, was admitted or proved and not denied.

On the special plea, the defendant introduced testimony to prove the authority of Huggins to make the settlement and give the discharge.

The cause was submitted to the jury upon the evidence; and they returned a verdict for the defendant. The plaintiffs thereupon moved for a new trial, for a verdict against the evidence.

DUTTON & E. K. FOSTER, for the motion.

C. A. INGERSOLL & BLACKMAN, against the motion.

Ellsworth, J. — This is a motion for a new trial, because the verdict is against evidence.

It has been argued before us, as if two issues had been tried to the jury; one upon the sufficiency of the evidence to support the declaration, and the other, the sufficiency of the evidence in support of the plea of accord and satisfaction, and release.

We are of opinion the jury erred, in rendering their verdict for the defendant, on either ground of defense, and so obviously erred, that we shall allow the plaintiffs to present their cause for trial, to another jury.

The court is reluctant, at all times, to set aside the verdict of a jury, for the cause that they have erred in weighing evidence; nor do the court feel at liberty to do this, where the jury have passed upon a mere question of fact, unless we see that the verdict is so palpably and manifestly against evidence, as that it is apparent their minds were not open to reason and conviction, or that an improper influence, from some cause or other, was brought to bear on their deliberations. We do not say that this is that case; nor that we would now interpose and grant a new trial, did we consider the verdict as involving matters of fact only. But it involves more. We think the jury must have proceeded upon false notions of law; certainly they did, if they found there had been no fault or negligence, on the part of the defendant, or his agent. Neglect of duty, or legal negligence is not in all cases a pure question of fact for the jury, but is often mixed up with principles of law, so that negligence becomes a conclusion of law rather than of fact; or more properly, it becomes a rule of responsibility, which courts, through the verdict, aim to have applied faithfully and uniformly. Jurors not unfrequently entertain singular notions of the accountability of common carriers and stage proprietors; and they will, sometimes, pertinaciously follow out those notions, notwithstanding the instructions and efforts of the court to the contrary.

Upon the undisputed facts in this case, we believe there was clear, culpable negligence in the defendant's agent. Here was a stage sleigh, loaded within and without with passengers, thirteen in number, on narrow double runners (of course, somewhat unsteady), passing on a road made smooth and sidling by constant use. And this place was on the edge of a dangerous gutter, which the driver well knew from his long familiarity with the road both in summer and winter. The danger was enhanced by the 418 pounds of iron stowed upon the top. Nothing was more probable than that this sleigh would upset, in any place of danger or difficulty. The hind runners slid down the declivity of the worn road into the gutter below, and the stage was upset. It might, under the circumstances, have been expected, and need not be ascribed to any accidental cause; nothing extraordinary had happened, and no difficulty existed but what a prudent, careful man could and would have foreseen and avoided. Beyond a question, this stage, for such a load, was greatly overloaded and rendered unmanageable. The place in the road had become dangerous from the very great use to which it had been subjected, on the day of the accident and the

day previous; together with the recent fall of snow. *Why*, we ask, did the accident happen? Why did the stage upset? It was broad day; the horses were under entire command; and nothing had given way. Now, while we would not be too rigorous in laying down the degree of attention required from stage proprietors and railroad companies in transporting passengers, we must hold them to the greatest care and watchfulness. See *Fuller et ux. v. The Naugatuck Railroad*, 21 Conn. 557, 576, as to the degree of care required (1).

The rule of law on this subject is fully established, in our own courts and elsewhere, and is not controverted by the learned counsel in this case. The principle is, that in the care of common carriers of passengers, the highest degree of care which a reasonable man would use, is required. This rule applies alike to the character of the vehicle, the horses and harness, the skill and sobriety of the driver, and to the manner of conducting the stage, under every emergency or difficulty. The driver must, of course, be attentive and watchful. He has, for the time being, committed to his trust the safety and lives of people, old and young, women and children, locked up, as it were, in the coach or rail-car, ignorant, helpless, and having no eyes, or ears, or power to guard against danger, and who look to him for safety in their transportation. The contract to carry passengers differs, it is true, from a contract to carry freight; but in both cases, the rule is rigorous and imperative: in the latter, the carrier is answerable at all events, except for the act of God and the public enemy; while, in the former, the most perfect care of prudent and cautious men is demanded and required. The stage owner does not *warrant* the safety of passengers; yet his undertaking and liability as to them, go to this extent: that he, or his agent, shall possess competent skill, and that, as far as human foresight and care can reasonably go, he will transport them safely. He is not liable for injuries happening to passengers, from sheer accident, or misfortune, where there is no negligence or fault, and where no want of caution, foresight or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his driver. *Hall v. Conn. River Steamboat Co.* 13 Conn. 320 (2); *Stokes v. Saltonstall*, 13 Pet. 191 (3).

1. *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557, is reported in 2 Am. Neg. Cas. 266.

2. See this case reported in this volume, p. 136, *ante*.

3. *Stokes v. Saltonstall*, 13 Pet. 181, 191, is reported in 7 Am. Neg. Cas. 297.

The defendant relies upon his proof, that the stage was not overloaded; that thirteen passengers with their baggage, and with freight, to the amount of 418 pounds, placed on the top, is not unreasonable or excessive. He says his sleigh was strong, his horses kind, his driver skillful and sober; and that this is enough to screen him from liability. Now, all this may be true; and yet there may have been, and we think there was, great culpable negligence. Obviously, the place had become unsafe and perilous. If the sleigh slipped on the margin of the gutter, it was sure to upset, and if it did upset, the weight of the iron was likely to produce the very result we discover, *i. e.*, pinning down Mrs. Derwort, with her broken arm, until the iron could be removed and she rescued from her alarming condition. We see not why the driver could not have gone, as in fact others did, further east or further west. If necessary, he should have stopped the horses and descended from his seat, and examined the difficulties in the way. He could have beaten down the drift of snow, if really blocking the path, and he could not otherwise have sufficiently hugged the west bank, or he should have examined and gone, as he certainly might, in the gutter on the east; and if he could not have done either, he should have given the passengers notice of the danger that was apparent, that they might have left the sleigh, and thus saved themselves from the imminent danger of passing upon the brink of this gutter. This carefulness might have occasioned some delay and trouble to the driver; but it is no more than what a reasonable man would have done, on the occasion; and if done, it would have saved a world of suffering, and an injury to Mrs. Derwort, which makes her helpless and dependent through life.

It is no apology that freight is put upon these stages, as in this case, under public or any other notices. The liability continues the same. Nor is it any apology that stage proprietors and their drivers are accustomed to load down their stages with passengers and freight, notwithstanding the state of the roads, until nothing more can be crowded within or accumulated on the top. It is high time that the law on this subject should be better understood and regarded; and that such unpardonable liberties should cease to be taken by persons who stipulate to carry passengers safely and without exposure. Converting stage coaches into freight wagons to transport iron, and well nigh everything else, is the last innovation upon the rights of the travelling community, and it is one which we do not intend to sanction or countenance.

As to the compromise and release by Mr. Huggins, for the sum of \$350, paid to him by the defendant, if that was the ground of the verdict, we fear the jury gave it an importance in their deliberations to which it is not entitled. If indeed the defendant was frank and fair in seeking the plaintiffs' lawyer at all, rather than the plaintiffs themselves, for the purpose of effecting a compromise, and has properly settled the case by paying said lawyer the stipulated satisfaction, it is hard, we admit, that he should be obliged to pay it again; but the loss must fall upon one of these parties; and we know of no rule, but what the law declares, to say which shall bear it.

It cannot be contended from the evidence, that Mr. Huggins had any specific authority to make a settlement and release. He was, it is true, their attorney, in court, to conduct the cause to a final judgment; but this gave him no authority out of court to put an end to it, at his election, upon terms satisfactory to himself. It is true Huggins swears that he was especially authorized to settle with the defendant, and discharged the suit; and this is substantially all the evidence the defendant adduces to make out such authority. On the other hand, Mr. Derwort distinctly denies it and insists that he gave no such authority. We do not feel at liberty to give credit to the testimony of Mr. Huggins; for his own narration of the matter, and his admitted deceptive conduct and declarations, destroy the credibility of his testimony. The transaction, viewed most favorably for Mr. Huggins, reflects no honor upon his fidelity and integrity; but rather, it would seem, that under a momentary pressure, he has abused his client's confidence, and sullied the fame of a profession which lends no countenance to deception and dishonesty.

But, it is said, Mr. Huggins is to be taken to have authority, because he was the plaintiffs' attorney in court. No case has been cited which sustains this position. An attorney is the representative of his client in court; he is held to be authorized to commence and conduct that cause to final judgment and execution, and to do whatever is usual and necessary to bring about that end, through all the forms and stages of legal proceedings. Further, there are cases where it is held, that he may go beyond this, as if the execution is returned unsatisfied; it has been held, he may proceed to collect the debt, by instituting a new suit on the judgment. In all cases, he may give directions to the sheriff in levying the execution, and he may receive the money from the sheriff, when collected; but he cannot receive a part of the execution and discharge the debtor; nor can he receive anything in payment but money, nor the

note of the defendant, and much less can he compromise the action, or the claim before judgment, for what may be satisfactory to himself. We refrain from going into the various distinctions given in the books on this subject. The general question of the authority of an attorney has often been discussed in courts of justice, and many cases are to be found in which distinctions, of more or less importance, have been taken. But in none of them is it held, that an attorney, who is clothed with no other authority than what is incident to his retainer, can compromise and discharge the claim. We find no reported case where the principles are discussed so elaborately and satisfactorily, as by Ch. J. Hosmer, in *Brackett v. Norton*, 4 Conn. 517. To those who wish to prosecute this inquiry further, we refer to *Smith v. Bossard*, McCord's Ch. R. 409; *Gaillard v. Smart*, 6 Cowen, 385; *Cheever v. Merrick*, 2 N. H. 376; *Lewis, Admx. v. Gamage*, 1 Pick. 347; *Huston v. Mitchell*, 14 S. & R. 307; *Kellogg v. Gilbert*, 10 Johns. R. 220; *Commissioners of Accounts v. Rose et al.*, 1 Desaus. 469; *Gorham v. Gale*, 7 Cowen, 739; *Richardson v. Talbot*, 2 Bibb, 382; *Gray v. Wass*, 1 Greenl. 257; *Holker v. Parker*, 7 Cranch, 436; *Lambert v. Sanford*, 2 Blackf. 137; *Herbert v. Alexander*, 2 Call, 498; *Vail v. Conant*, 15 Vt. 314; *Sharp v. Gray*, 9 Bing. 457, 23 E. C. L. 331.

New trial advised.

HOOD V. NEW YORK AND NEW HAVEN RAILROAD COMPANY.

Supreme Court of Errors, Connecticut, July Term, 1853.

[Reported in 22 Conn. 502.]

CARRIER OF PASSENGERS—CONTRACT—INJURED ON STAGE COACH.—The agent of the defendants, who were a railroad corporation, running their cars from N. H. to P., sold the plaintiff a ticket for the fare from N. H. to C., which was five miles beyond P. The plaintiff, for injuries which he received in a stage running between P. and C., brought his action, upon a special contract, to carry him safely by railroad and stage, from N. H. to C. For more than six months before, and at the time of such sale, the defendants, through their agents, had been and were in the daily usage of entering into and fulfilling contracts identically like that alleged in the declaration, and, during said entire period, had permitted their agents publicly to represent them as vested with the powers requisite for such purpose. The plaintiff, knowing such representations, and believing them to be true, was thereby induced to enter into and pay the consideration of said contract, which otherwise

he would not have done. But the defendants had not the power, under their charter, to enter into the alleged contract and had never, by any corporate vote, expressly authorized or sanctioned the same, nor had their directors, by any vote, directed any such contract to be made. *Held*, that the defendants were not estopped to claim that, under their charter, they had no power to enter into the alleged contract, and that it was not obligatory upon them.

A NEW trial having been granted by this court, in the case of *Hood v. The New York and New Haven Railroad Company*, (22 Conn. 1), the cause came on again for trial before the jury, at the term of the Superior Court of New Haven county, holden in January, 1853 (1).

Upon the trial to the jury, the plaintiff introduced in evidence the charter of the defendants, and the charter of the New Haven and Northampton Company, a railroad corporation, incorporated by the legislature of this State, for the purpose of constructing a railroad from the city of New Haven to the village of Plainville, in the town of Farmington, and of extending the same thence northerly to the north line of the State; also a lease from the latter company, of their entire road, to the defendants.

The plaintiff offered evidence to prove, and claimed that he had proved, the contract, as set forth in his declaration.

The defendants denied ever having made any such contract, and further claimed, that, if such contract were proved, it was not obligatory upon them, for the reason that, under their charter, they had

1. The syllabus in *HOOD v. NEW YORK & NEW HAVEN R. R. CO.*, 22 Conn. 1 (the appeal in the former case), is as follows: "The defendants, at the time specified in the declaration, were running their cars, as common carriers, from N. H. to P., five miles short of C., their liability ending at P., except as resulting from stage carriage beyond P. They had given public notice, by advertisement in the newspapers, that the cars on their road from N. H. would arrive at P., and stages would leave P. for C., at the times specified in such notice. The plaintiff bought of the defendants a ticket for the fare from N. H. to C. The injury complained of happened in the stage between P. and C. The defendants did

not own or control the stage, nor participate in the profits of its use. In an action founded on a special contract to carry the plaintiff safely from N. H. to C., by railroad and stage, it was held that the advertisement implied no liability of the defendants beyond the line of their road, and the ticket showed only the receipt of so much money paid by the plaintiff, which was all that he was to pay, previous to his arrival at C.; and consequently, the undertaking alleged was not proved; therefore, a verdict for the plaintiff was set aside as against the evidence." The plaintiff was injured by the overturning of the stage and on the trial of the case recovered a verdict for \$3,400. New trial granted.

no power to enter into any such contract, and prayed the court so to instruct the jury. "The court, upon this subject, did inform the jury, that the defendants had not, under their charter, the power to enter into any such contract, and that the same, if proved, would no be obligatory upon them, unless they were estopped from denying their power, as claimed by the plaintiff."

The plaintiff also offered evidence to prove, and claimed that he had proved, that the defendants, from the time of taking possession of the canal road, under the aforesaid lease, and for a period of more than six months anterior to the making of the alleged contract with him, had been and were, in the daily usage of entering into, and fulfilling contracts identically like that alleged in the declaration; that, during that entire period, they had publicly represented and held themselves out to the community, through their duly authorized agents, as vested with powers requisite to enter into and fulfill such contracts, and during that entire period, had knowingly permitted their agents to represent the said company, as vested with the aforesaid powers; that the plaintiff, knowing of such representations, and believing them to be true, and being ignorant of the corporate powers of the defendants, was thereby induced to enter into said contract, and pay the defendants, therefor, the consideration demanded by them, which he should not have done, had he not known of such representations, and believed them to be true. The plaintiff thereupon claimed, that if the jury should find the facts to be as claimed by him, the defendants were estopped from denying the obligation of said contract, and requested the court so to instruct the jury.

The defendants denied that the facts were as claimed by the plaintiff, and introduced evidence to disprove the same.

The evidence in support of the plaintiff's claim, consisted of certain acts and declarations of the agents of the defendants, in issuing and selling tickets, and making contracts for the transportation of passengers, similar to the one claimed to have been made with the plaintiff, and in receiving and paying over to the proper officers of said company, the moneys received from the sale of such tickets, and the transportation of such passengers, and the continuance of such acts, for so long a time, and in a manner so public and notorious, that, as the plaintiff claimed, they must have been known to the directors and stockholders of said company; and that, after such acts had become so known, the said agents were suffered to continue them, without objection from any one.

But there was no evidence that the defendants, by any corporate

vote, had ever expressly authorized or sanctioned the making of any such contract, as the plaintiff claimed had been made with him. Nor was there any evidence, that the directors of said company had, by any express vote or order, directed any such contract to be made. But it was proved, and not denied that they had appointed the proper officers and agents of said company, and without giving them any particular instructions upon the subject, had permitted them, without objection on their part, to make the declarations and perform the acts aforesaid.

The defendants thereupon claimed, that, even if the jury should find the facts to be as claimed by the plaintiff, they were not estopped from denying the obligation of said contract, because they could not, in any manner, be estopped from denying the validity of a contract, which, by the terms of their charter, they had no power to make. And they further claimed, that they could not be estopped, by any acts, declarations, or contracts, made by any of their officers or agents, which they did not expressly authorize to be made, and which, by their charter, neither the company nor their officers or agents were authorized to make, and prayed the court so to instruct the jury. The court did not instruct the jury in the manner claimed by the defendant, but charged them in conformity with the claim of the plaintiff.

The jury having returned their verdict in favor of the plaintiff, the defendants moved for a new trial, claiming that the court erred in omitting to charge the jury, as requested by them; and the questions thereon arising were reserved for the consideration and advice of this court.

DUTTON & C. A. INGERSOLL, for the motion.

BALDWIN, BRACH and R. I. & C. R. INGERSOLL, against the motion.

Ellsworth, J. — This case was before the court at its last session, when we granted a new trial for a verdict against evidence. The question now presented was not then adjudicated, though it was alluded to, in the arguments of counsel, and in the opinion of the court, as one of great importance. There was another ground for granting the new trial, entirely satisfactory to the majority of the judges, and this was passed by. It is now distinctly presented for our judgment and is the only question on the record.

After the fullest consideration, with the aid derived from the learned and able arguments at the bar, a majority of the court do not hesitate to hold, there must be a new trial.

It will be noticed that the suit is upon a special promise of the defendants to carry the plaintiff from New Haven to Collinsville; not an action against common carriers, for an injury suffered, while passing over their road, nor as founded upon a responsibility growing out of such relations. This would not answer—for the defendants could not be common carriers, except on their own road; so the pleader declares upon a special undertaking of the defendants, aside from their appropriate line of duty, and the attempt is, to subject them on that undertaking, and on nothing else.

It is found, that the defendants had no power to enter into the undertaking in question, and therefore, as a ground of claim, it must be agreed, the undertaking merely is of no avail, for the reason that the directors, having no authority, did not, in legal estimation, make the contract for the company. The question is, are the defendants estopped setting up this in their defense? The statement of the case carries on its very face conviction to the mind, and it can not be so. The defendants are estopped from denying that they have done what they never could have done. It is a question of power, under the charter; and however individuals may be liable and estopped, who untruly hold themselves out as clothed with power, the defendants can not be estopped, on any such principle of law known to the court. The notion of an estoppel *in pais*, to which class, if any, this estoppel belongs, proceeds on the idea of acquiescence or consent; a consent expressly or impliedly given by the party claimed to be estopped. Of course, there must be a legal possibility or there can be no real or supposed acquiescence and consent, and where consent may be given, silence may be sufficient proof that it is given; and so, a course of known action may be sufficient proof; for the law requires no exact form. But as we say, it does require a legal possibility, and where there is none, courts cannot consistently hold, there is an estoppel. The case of Buckley against The Derby Fishing Company, 2 Conn. 252, and that class of cases, which abound in the books, is a good illustration of the distinction above alluded to. If a corporation has the power to do a thing, and is in the habit of doing it, in a particular way, it may bind itself to third persons, though it does not pursue the exact mode prescribed in the charter; but the mode is not exclusive, but concurrent. So, too, where a provision in the charter is designed to protect the corporation, the corporation may waive this provision, and this may be proved to be done, by a repetition of acts of a like or similar character. But the question here, is, as we have said, one of power, not of form.

The plaintiff introduced circumstantial evidence on the trial, to prove, that the directors of the company made the contract, and particularly, that their subordinate agents had, for some six months previously, been in the practice of contracting with other persons, as they did with the plaintiff. Suppose this is true, and that the knowledge and consent of the directors may be properly inferred, from this continued practice of the directors; this will not place the plaintiff's case, in our judgment, on any higher ground, than if the directors had, by a formal vote, contracted with the plaintiff, to carry him to Collinsville. It being a question of power, silent acquiescence in the acts of subordinate agents does not make a stronger case; for, if a formal contract is not obligatory on the company, one proved by inferior or circumstantial evidence certainly is not. The kind of evidence is quite immaterial. Should the directors of a savings bank, or of any bank, contract with a ship builder, for a steamship, to navigate the ocean, would this contract bind the company? Certainly not; because the directors have no power to make it; nor would they have more, were they to make such contracts, from day to day. The legislature has absolutely marked the limit of their power, and they cannot exceed it, under the charter; and if the directors, even with all the stockholders at their side, transcend the limits of the charter, and make contracts foreign to their business, they only act for themselves. The reason is, there can be no consent of the corporation. The consent of individual stockholders, however repeated, is not their consent, nor is it admissible proof, to establish consent; so that, if it were true, every stockholder had expressed his consent, it would make no difference in the case. If this is not so, there are no restrictions or limitations on chartered companies, and they do anything and everything the directors please, which is not absolutely unlawful. The exercise of power is held to prove itself; which is absurd.

No one will say, that the first contract made by the directors, to carry to Collinsville, or Litchfield, or New Hartford, or Northampton, would be obligatory on the company; yet it must be so, if stockholders are, of course, bound by every contract of their directors. Were the charter a public one, it is agreed, the company would not be bound by such acts, however repeated; but in truth, a private charter is not essentially different from a public one, in this respect; for, the plaintiff must have known, that the defendants were incorporated by the legislature, for the purpose of making or using a railroad. Their very name, as well as the location and busi-

ness of their road, is sufficient notice, that they are not incorporated for running stages throughout the State; and no person can assume or suppose, the defendants are to go beyond the appropriate business of a railroad. The idea of an imposition on the public, as to these stages running off from the road, to and from Litchfield and other places, at the defendants' stages, is incredible and preposterous. The public knows where the charter may be seen, and what it contains.

Many cases were read, on the argument, to prove that a corporation is considered for civil purposes, as a person, and subject to the same rules of law. We do not question this, but we do not see how it helps the plaintiff's case. They hold, that a principal that can give authority, whether a corporation or person, may, when one assumes to act for him, and he does not object to it, be estopped denying his agency; but an infant is never estopped, nor a married woman, nor ought a body of stockholders to be, united as they are, under a specific charter; especially when the directors have disregarded it, and assumed to act according to their own pleasure. Could the company by legal possibility, do the act, it would be otherwise.

But, it is said, the jury have found that the stockholders, in fact, gave their consent, and it may not now be denied. We have already shown, this can make no difference; but we say further, that this notion of their consent is altogether untenable and unjust. We know certainly, the stockholders did not, all of them, give their consent. Some were minors, married women, executors and administrators, trustees, officers of the law in possession, and some were, at the time, out of the country. So the body of stockholders was changing from day to day. Now, to hold that the entire body of stockholders gave their consent to the contract in question, and that therefore it is good, is absurd and puerile. But, suppose they did; this was not a corporate act, and has, therefore, no corporate character. We repeat, that the directors and stockholders have no corporate powers or relations, and can give no corporate consent, but what is within the appropriate business of the charter.

Again, it is said, the defendants ought not to be permitted to call in question the acts of their agents. Why not, as much as other principals, whose agents transcend their authority, and abuse their trust? If it is replied, the directors have suffered this course of things, for months, when they could have arrested it, at once, we ask, whose agents they were? Certainly not of the innocent stockholders. The directors represent them only, while they act within

the scope of the charter; the charter is the measure of their power; and sad would it be if directors could trample upon this, and yet bind the stockholders as firmly as if they were acting within it. If the directors have done wrong, let them suffer the consequences.

We have not thought it necessary to comment particularly of the numerous authorities, cited at the bar, on the several points made, for we find nothing in any of them, inconsistent with the views expressed.

Gill & Johnson is in direct accordance with what we have said. We place our judgment upon a plain principle of equity and law, viz., that these defendants are not bound, by a contract they had no power to make, and are not estopped setting up this matter in defense.

We advise a new trial.

STOCKMAN INJURED ON TRAIN—RIDING IN STOCK CAR—TRESPASSER.—In an action to recover damages for injuries sustained by plaintiff, a stockman, while travelling on defendant's train; judgment was rendered for plaintiff for \$1,000, from which defendant appealed. On appeal the question whether the plaintiff was a trespasser at the time of the accident was discussed. The court (per GRANGER, J.), said:

"The whole controversy in the case depends upon this question: Was there any contract relation, express or implied, between the plaintiff and the defendant in this case; or, in other words, was the plaintiff a passenger, according to the legal meaning of the term, on the defendant's road at the time the accident happened?"

"We have no hesitation in answering this question in the negative, and in saying that the defendant, under the facts disclosed in the finding, was not liable for more than nominal damages. The plaintiff was in no legal sense a passenger on the road, but was in the car at the time without the consent or knowledge of the defendant. This clearly appears from the facts disclosed. The train upon which he was injured was, so far as the case shows, exclusively a freight train; there was no passenger car attached, and no invitation to the plaintiff nor to the public to take passage upon it. The plaintiff paid no fare, and whether he intended to pay or not when called upon is of no consequence, so that his good or bad faith in taking his place on the car among the horses is quite immaterial. He had no business to be there without the consent of the defendant, and he had no rights except that of immunity from willful and wanton injury common to all citizens. Railroad companies have the clear and undoubted right to make rules and regulations that are reasonable and proper for the running of their trains. It would be impossible to conduct their vast business otherwise. If a person desires to be transported as a passenger he must comply with the rules of the company in regard to payment of fare and conduct while on the

train, and all other reasonable requirements of the company. If a person desires to have his goods transported he must in like manner comply with the rules of the company in relation to all matters appertaining to the shipment, transfer and delivery of the goods transported. The whole duty of the company towards shipper or passenger is a duty resting entirely upon contract, express or implied.

"Now what was the contract duty of the defendant towards this plaintiff? Was there any? What are the facts? The plaintiff really had no transaction whatever with the defendant. He bought no ticket, paid no freight, in no way made himself known to the company or any of its agents or employees, either as passenger, shipper, or custodian of any of the horses which had been shipped by Avery. This person it seems, on the 14th of October, 1881, contracted with the defendant corporation to transport eight horses from Huntington, Massachusetts, to Harlem River or New York. Avery owned but seven of these horses; one belonged to a brother of the plaintiff, Rev. Dr. Gardner of New York. The plaintiff had the custody of this horse. Avery was applied to by him prior to October 14th, to permit this horse to go along with his horses under the same way-bill and to permit the plaintiff to accompany it. Avery engaged cars of the defendant for the eight horses a day or two before the 14th, at which time he was fully informed by the defendant of its rates and rules for the transportation of live stock. One of these rules was that 'one person will be allowed to pass free when accompanying his stock to take care of it and paying the price for not less than nine thousand pounds, and in no case will he be allowed to ride free on a passenger train.'

"At this time Avery said to the defendant's agent that there might be another man to go with him, and he was told by the agent distinctly that one of them would have to pay fare. Avery at this time made no mention of the plaintiff and did not disclose the fact that he was not the owner of all the eight horses. The name and existence of the plaintiff, the fact that he had any interest in one of the horses, or that he intended to accompany Avery, was, studiously or otherwise concealed from the defendant. Avery in this transaction must be held to be the agent of the plaintiff and must be presumed to have communicated to him the terms upon which the animals were shipped; if not, the plaintiff was bound to ascertain for himself, before he started upon the train with the horses, whether or not he had a right to be there. The defendant concealed nothing; the rules and regulations were known and read of all men who had dealings with the company, or might have been, and it would have been very easy for the plaintiff to place himself in a correct position in relation to the company; but the facts all show that he was in a false position, and whether he intended to go on the train as a stow-away or not, is, as we have said, immaterial.

"An excuse, or something in its nature, is claimed by the plaintiff for his non-payment of fare. It is said that there was not time for

him to procure a ticket after the horses were loaded and that he was expecting to pay his fare when the conductor called for it. But the case does not show that it was the custom of conductors, or their duty, on a train of this character to call for fares or tickets; for aught that appears it was a stock train without any passenger car attached, while it also appears that the plaintiff was in one of the cars with the horses. It will be remembered that the rules of the company permitted one person to ride in the car with his stock to look after and take care of it, and it is a reasonable presumption that the conductor was not expected to go through the stock car for the purpose of collecting fare or taking up tickets. It is a place where passengers would not be likely to ride unless the safety of their stock required it, or unless their intent was to secure a free ride.

"The plaintiff then of his own motion placed himself in this car with the horses without the consent or knowledge of the defendant, and against the rules of the company as to payment of fare. He well knew, or had the means of knowing, that he had no right there as a passenger, and he also knew, or ought to have known, that it was a place of extra hazard; a car loaded with horses being, in case of collision or any serious accident, anything but a safe or desirable place for a passenger. Whatever injury the plaintiff received we think therefore must be attributed to his own neglect or misconduct in placing himself in a position of peril without any express or implied assent on the part of the defendant (1)." Judgment reversed. *W. C. CASE*, appeared for appellant; *C. R. INGERSOLL* and *W. B. STODDARD*, for appellee. *Supreme Court of Errors, Connecticut, June Term, 1883. Gardner v. New Haven & Northampton Co.*, 51 Conn. 143.

PASSENGER FALLING FROM STATION PLATFORM—CONTRIBUTORY NEGLIGENCE.—In an action to recover damages for injuries sustained by plaintiff by falling from the platform of the depot at defendant's station at Yatesville, the facts appeared as follows: The plaintiff lived near the station, which was a small village, and arrived there in the evening on one of the defendant's trains. The station agent had left and there was no light in the depot except one lantern. One outside lamp was burning which lighted the platform on the east side of the depot. The plaintiff went to the waiting room to speak to an employee of the defendant. He then, in company with another man, started to go home. From the

1. In *DONOVAN v. HARTFORD STREET R'Y CO.*, 65 Conn. 201 (1894), plaintiff, intending to take one of defendant's street cars, signaled an approaching car which the driver answered affirmatively, but before the car reached the crosswalk it was unexpectedly deflected to a side

track on which plaintiff was standing, and struck and injured her. Held, that the relation of passenger and carrier did not exist between plaintiff and defendant at the time of such injury, and judgment for defendant was affirmed.

easterly platform two stairways lead to the ground below. Near the easterly end of the north platform is another stairway. All these stairways were sufficiently lighted by the burning lamp. They passed by all these stairways on to the north platform, "passing into utter darkness," intending to go down some stairs near the westerly end of the north platform. That part of the platform "was entirely dark and the steps indistinguishable." The plaintiff missed his calculation, went some eight inches beyond the stairs, and walked off the westerly end of the platform, falling some four feet to the ground and was seriously injured. The action was tried in the Superior Court of New Haven county. The defendant demurred to the complaint, which demurrer was overruled and the case was heard before Fenn, J. Nominal damages were assessed and plaintiff appealed. The case was disposed of entirely on the question of contributory negligence and the court below was sustained. The plaintiff was bound to use the utmost care to avoid harm, and a slight want of care became gross negligence. The plaintiff having of his own accord left the lighted part of the platform and passed to the dark part was guilty of contributory negligence. Judgment affirmed. *W. C. CASE and W. H. ELY*, appeared for appellant; *W. K. TOWNSEND and G. D. WATROUS*, for appellee. Opinion by *CARPENTER, J.* *Supreme Court of Errors, Connecticut, September, 1889. Bennett v. New York, New Haven & Hartford Railroad Co., 57 Conn. 422.*

DERAILMENT OF TRAIN—CONDITION OF TRACK—EVIDENCE.—Plaintiff, while a passenger upon one of appellant's trains, received personal injuries, through the derailment of the coach in which she was riding. The accident was caused by a broken rail. Verdict and judgment, in the District Court of Brule county, for plaintiff for \$3,000. On appeal by defendant judgment was reversed on the ground of erroneous admission of certain evidence and giving of instructions. It was error to admit evidence tending to show former condition of track, as the evidence should be confined as to state of track at time of accident. The charge that, "experience proves that when the track and machinery are in perfect condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on the cars—the passengers on board," in connection with the paragraph: "Whenever a car leaves the track and goes down an embankment, as this car did, it proves that either the track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in proper condition and to operate it with proper prudence and care, have in some manner violated their duty to the plaintiff," was erroneous in that it tended to show that the happening of such accident was conclusive, instead of *prima facie* evidence. *J. W. CARY and R. B. TRIPP* (*BURTON HANSON*, of counsel), appeared for appellant; *J. M. LONG*, for respondent.

Opinion by McCONNELL, J. *Supreme Court, Dakota Territory, May, 1888. Pattee v. Chicago, Milwaukee & St. Paul Railway Co., 5 Dak. 267.*

PASSENGER INJURED AT STATION—PLATFORM AND APPROACHES NOT LIGHTED.—In an action for damages for injuries received by plaintiff at defendant's station the court (*per COMEGYS, CH. J.*), charged the jury that railroad companies are bound to provide safe and convenient means of approach to their stations for all who take or leave their trains as passengers; and such stations must be sufficiently lighted and kept lighted until the passengers have had a reasonable time to reach a safe public thoroughfare, by the aid of such lighting, if needed, or unless a guide be furnished for the purpose by the company. Where the passenger is a total stranger to the station and its surroundings, and finds himself almost immediately after alighting from a train, left by an agent of the carriers in utter darkness, from the extinguishment of such light as there was, the carrier cannot claim that the passenger is a wrongdoer if, in groping his way from the station, he, in his effort to get to a place of safety, or for information, cross other ground of the defendant than that upon which the station is actually erected. [At the conclusion of the trial the jury disagreed.] JOHN BIGGS and LEVI C. BIRD, appeared for plaintiff; EDWARD G. BRADFORD and LEWIS C. VANDEGRIFT, for defendant. *Superior Court, Delaware, December, 1889. Wallace v. Wilmington & Northern Railroad Co., 8 Houst. (Del.) 529.*

INFANT FALLING FROM OPEN STREET CAR.—In an action to recover damages for injuries sustained by an infant passenger on one of defendant's street cars, it appeared that the plaintiff was, at the time of the accident, a child of about four years of age. He, with his mother and three other children, aged about nine, seven and two years, respectively, got upon the car No. 94 of the defendant's line, in Georgetown, to be carried to Fourth and East Capitol street, in this city. The mother with her four children, got on the car about 8 o'clock in the evening, it being then dark. The two eldest children, daughters, were seated in front of the mother, the youngest on her lap, and the plaintiff occupied the seat with his mother, and was placed next to the aisle or space running through the middle of the car between the rows of seats. All the parties continued thus seated until the car had reached a point opposite the City Hall, on its route to its eastern terminus, when the plaintiff asked leave of his mother to change his seat. This he was allowed to do, and he got into another seat by himself, and seated himself at the end of the seat next to the outer rail. His mother then directed the elder sister to go and take a seat by the plaintiff, and to get to the farther end of the seat next to the rail, and to let the plaintiff take the inner end of the seat, next to the aisle. The sister went to the plaintiff, as directed by the mother, and told him to get down and give her the seat next

the rail, and in attempting to get down to change his seat, he missed his footing and fell through the open space, between the floor of the car and the side rail, to the ground, and his leg was run over and crushed by the wheels of the car, and was so badly injured that it was necessary to amputate it. It also appeared that the car in which these parties were thus seated, and in which the accident occurred, was what is known as an open or summer car, which has an aisle in the middle, and seats or benches for two or three persons each arranged on the sides of this space. These seats or benches project over and beyond the floor of the car on each side, one side being entirely open, and having a step to enable passengers to get in and out the car; and the other side, known as the inner side, because it is next to the adjoining track, though open, has two lateral rails running parallel along the side of the car, outside the ends of the seats or benches, fastened to the stanchions. One of these rails is situated on a line with the ends of the seats, and is eighteen inches above the floor of the car; the other rail is eight inches above the lower one. There is no step on this inner side of the car, and these rails are placed on that side of the car to prevent passengers from getting on or off, and from falling off. There are no guards or fenders of any kind around the wheels of the car. It was alleged that the cars were defectively and unsafely constructed, at least for the carriage of children, and that it was by reason of such defective and unsafe construction that the accident occurred. What was alleged to be the defective or unsafe structure of the car, with a view to the safe carriage of children passengers, was that the seats or benches project beyond the floor of the car at the side; and that the rail placed at the side to prevent passengers from getting off and from falling off, was eighteen inches above the floor; and as the seats were eighteen inches apart, it left or made an open space of eighteen inches high and eighteen inches broad, of an oval shape, part of which appears to be directly under the end of the seat; and thus made an unsafe opening for children passengers. It was through this open space between the floor and the rail that the child fell. And though there was no proof of any like accident happening to children since the cars of that make have been in use on the line, (the cars having been used since 1890), yet the proof showed it to have been a frequent thing for hats, canes, umbrellas and packages to fall through those openings. That they were dangerous to small children, the occurrence of this accident demonstrates. On the trial there was a verdict and judgment for plaintiff from which defendant appealed. On the appeal the court, in the course of its opinion (per ALVEY, C. J.), said: "It may be very true that the car in which this accident occurred was in all respects entirely safe for the carriage of adult passengers. But the obligation of the defendant as a common carrier of passengers for hire requires more than that. It requires the carrier, by the exercise of the greatest care and precaution against the occurrence of accidents, to provide cars and appliances for the safe transportation of all conditions of people entitled to be carried.

The old and the young are alike entitled to be carried safely. And while a car may be safe for an adult person, it may not be safe for the conveyance of children of tender years.

"Accidents sometimes are extraordinary in their character, and it is difficult to anticipate their occurrence; but if there be negligence or want of the proper degree of caution and prudence on the part of the carrier, the extraordinary nature of the accident will not excuse from liability. The very object of the strictness of the rule in requiring the highest degree of care and foresight to be exercised, is to avoid all possible accidents and injury. In this case, it was a matter of fact, as to whether the structure of the car was entirely safe for the transportation of infant children; and that was a question peculiarly within the province of the jury. The court could not have undertaken to decide the question, and declare that the structure of the car was safe, and such as it ought to have been, notwithstanding the occurrence of the accident, in connection with the other proof in the case. It is urged, however, that the mother did not take sufficient care of her child, and that it was owing to her permission to change his seat that the accident occurred. But we cannot perceive that there was any such neglect or want of care on the part of the mother, as would deprive the child of his right to recover for the injuries suffered by him. There is in fact nothing in the case to show neglect on her part; and it is quite unnecessary, therefore, for us to decide the much debated and variously decided question, whether the fault of the parent or guardian in control of the child should be imputed to the child to deprive him of his right to recover. And as to the supposed want of care on the part of the child himself to avoid danger, there is a clear distinction to be observed between the case of an adult, capable of exercising care and discretion, and that of a child of tender years, such as the plaintiff in this case. As said by the Supreme Court of the United States, 'The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years, are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case.' *Railroad Co. v. Gladmon*, 15 Wall. 401, 408. Here the child was but four years of age when the accident happened." *Judgment affirmed.* NATHANIEL WILSON and WILLIAM G. JOHNSON, for appellant; WEBB & WEBB, for appellee. *Court of Appeals, District of Columbia, January, 1895.* *Metropolitan Railroad Co. v. Falvey*, 5 App. D. C. 176.

ADAMS v. WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

Court of Appeals, District of Columbia, May, 1896.

[Reported in 9 App. D. C. 26.]

DIRECTING VERDICT.—The trial court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses, and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that plaintiff has not made out a case sufficient in law to entitle him to a verdict, and judgment thereon reversed (1).

RIDING ON PLATFORM NOT NEGLIGENCE IN LAW.—Riding on the platform, especially if the car was crowded, and with the implied, if not express, consent of defendant's agents, is not negligence in law (2).

STANDING ON PLATFORM—INTOXICATION.—Whether standing on the platform with his back to the car and with his hands in his overcoat pockets, on a very cold night, was an act of negligence, that, under the circumstances contributed in an appreciable degree to plaintiff's fall from the car, and also whether his indulgence in intoxicating liquor, of

1. *Compare* Harbison v. Met. R. Co., 9 App. D. C. 60, (case next reported herein) where the Adams case is distinguished.

2. In **ANDREWS v. THE CAPITOL, NORTH O STREET & SOUTH WASHINGTON RAILROAD CO.**, 2 Mackey (D. C.) 137, plaintiff was injured by being thrown from the rear platform of a street car of defendant's, on which he was riding as a passenger. By a special verdict plaintiff recovered \$2,600 damages, which, on appeal, was reversed on the ground of plaintiff's contributory negligence, it being shown that there was room for him to stand in the aisle of the car, the court holding that plaintiff took the risk of standing on the platform. Judgment for defendant accordingly.

METROPOLITAN R. R. CO. v. SNASHALL, 3 App. D. C. 420 (1895), was an action brought to recover damages for injuries sustained by plaintiff's wife,

while riding on the platform of a street car of defendant's, the car and aisle thereof being filled with people preventing her from getting inside the car. As she was about to pay her fare, the car turned a curve and she and her friend were thrown from the car, her arm being dislocated at the shoulder and sustaining other injuries. Verdict and judgment for plaintiffs for \$1,500. On appeal judgment affirmed.

In **METROPOLITAN R. R. CO. v. SNASHALL**, 3 App. D. C. 435, judgment for plaintiff was affirmed. This was an action by the husband to recover compensation for expenses, etc., incurred on account of injuries received by his wife in the preceding action mentioned (3 App. D. C. 420). The cases differed only as regarded the measure of damages, about which no question was raised; in all other respects they were identical.

which there was some slight evidence, contributed to the fall, were questions for the jury.

GATES ON CAR PLATFORM.—Where gates to the platform were maintained by defendant as a matter of precaution, with the knowledge of the public, although there was no law requiring the maintenance of such gates and keeping them closed next to the second track, the failure to close them on the occasion of the accident and the probable effect of such failure as contributing to the accident were proper matters for the jury to determine.

HEARING on an appeal by the plaintiff from a judgment on a verdict directed by the court. *Judgment reversed.*

C. M. SMITH and EDWIN FORREST, for appellant.

ENOCH TOTTEN, J. S. FLANNERY and W. D. DAVIDGE, for appellees.

Shepard, J. — 1. This is an action for damages for personal injuries. Whilst riding as a passenger on the front platform of a cable car on his way to the Baltimore and Ohio Railway station, about 11 o'clock at night, the plaintiff, Frank C. Adams, was thrown from the car, about the intersection of Seventh street and Pennsylvania avenue, and severely injured by a car going in the opposite direction upon the adjoining track. After the plaintiff's evidence was closed, the court, upon motion of the defendant, instructed the jury to return a verdict for the defendant.

2. The provinces of the court and jury in the Federal judiciary system are separate and distinct, and the line of division between them must be carefully observed. The ascertainment of this boundary is often a matter of difficulty in a particular case, and when the difficulty arises doubts should be resolved in favor of trial by jury, which is the constitutional right of every suitor in the courts of common law.

It is the province of the jury to determine the credibility of the witnesses and the weight of the evidence under proper directions in respect to the principles of law applicable thereto. And the court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon. Stated in many different ways, this, we think, is substantially the doctrine of the adjudged cases that control in this jurisdiction. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Randall v. B. & O. R. R.* 109 U. S. 478; *G. T. R. R. Co. v. Ives*, 144 U. S. 408, 417; *Railroad Co. v. Powers*,

149 U. S. 43 (1); *Gardner v. Railroad Co.*, 150 U. S. 349; *Chicago, etc., R. R. Co. v. Lowell*, 151 U. S. 209, 217 (2); *B. & P. R. R. Co. v. Carrington*, 3 App. D. C. 101, 109; *W. Gas L. Co. v. Poore*, 3 App. D. C. 127, 137; *Met. R. R. Co. v. Snashall*, 3 App. D. C. 420, 431 (3); *Weaver v. B. & O. R. R. Co.* 3 App. D. C. 436, 451 (4); *Warthen v. Hammond*, 5 App. D. C. 167; *Met. R. R. Co. v. Falvey*, 5 App. D. C. 176 (5); *B. & P. R. R. Co. v. Webster*, 6 App. D. C. 182; *Dist. Col. v. Boswell*, 6 App. D. C. 402; *W. & G. R. R. Co. v. Wright*, 7 App. D. C. 295.

3. Tested by the rule laid down, we are of the opinion that this case should have been submitted to the jury. But in reversing it for error we are not to be understood as having, much less as expressing, an opinion as regards the weight of the evidence or the inferences properly deducible therefrom. We cannot assume that the jury would necessarily have found a verdict for the plaintiff had the opportunity been given them, nor that they must have found for the defendant. In either event, the approval and disapproval of the verdict is within the province of the trial court, and any intimation as to the proper exercise of its discretion in that regard would be an unwarrantable intrusion on the part of the Appellate Court.

"The judge before whom the case is tried in the first instance has the same opportunity as the jury to form an opinion with respect to the weight to be given to each witness; and one of the highest and most important functions of his office is the power to set aside a verdict whenever, in the exercise of a sound discretion, he considers that the jury, from any cause whatever, has returned an improper or unjust verdict. One of his highest duties is the impartial and fearless exercise of this power." *Woods v. R. & D. R. R. Co.*, 1 App. D. C. 165, 169.

In this connection we would call attention also to what was said by this court, speaking through Mr. Justice Morris, in *Warthen v. Hammond*, *supra*:

"It has sometimes been said, and the statement is not an unfair inference from certain general expressions in some of the cases, that, whenever the trial court would set aside the verdict of a jury, when

1. *Richmond & Danville R. R. Co. v. Powers*, 149 U. S. 43, is reported in 7 Am. Neg. Cas. 369.

2. *Chicago, Mil. & St. P. R'y Co. v. Lowell*, 151 U. S. 209, is reported in 7 Am. Neg. Cas. 373.

3. See note of the *Snashall* case, page, 168 *ante*.

4. See note of the *Weaver* case, page 169, *post*.

5. See abstract of the *Falvey* case, page 161, *ante*.

rendered, it may in advance direct a verdict to the contrary. But this undoubtedly states the rule too broadly. For it is not only the right, but often the duty, of a trial court, in the interest of justice, to vacate a verdict when the court is satisfied that the preponderance of evidence is against the verdict; and its action in such regard is matter of sound discretion, not to be revised on appeal by a purely appellate tribunal. And yet, though the trial court may, and often should, set aside a verdict on the ground of the preponderance of evidence being against it, and again remit the issue to a jury, it is not for that reason authorized in the first instance to direct a verdict for the party in whose favor it regards the evidence as preponderating. Where there is testimony of a substantial character to go to the jury, it is always for the jury to determine the question of the preponderance of evidence, subject to the revisory power of the court to order a new trial."

4. Riding on the platform, especially if the car was crowded, and with the implied, if not express, consent of defendant's agents, certainly did not amount to contributory negligence in law, on the part of the plaintiff. *Met. R. R. Co. v. Snashall*, 3 App. D. C. 420, 433, and cases cited; *W. & G. R. R. Co. v. Harmon*, 147 U. S. 571, 580 (1); *Werle v. L. I. R. R. Co.*, 98 N. Y. 650; *Topeka City R'y Co. v. Higgs*, 38 Kan. 375. Whether standing thereon with his back to the car and with his hands in his overcoat pockets, on a very cold night, was an act of negligence that, under the circumstances, contributed in an appreciable degree to his fall from the car, was a question for the determination of the jury. Likewise it was for the jury to inquire if his indulgence in intoxicating liquor, of which there was some slight evidence, had a similar effect.

This case is unlike that of *Holland v. West End R. R. Co.*, 155 Mass. 387, which is relied on by the appellee. There the plaintiff was on the platform holding to the rail and swaying to and fro. He was so drunk that he had no recollection of his situation or of the receipt of the injury. There was no proof whatever that his fall was even contributed to by the slightest act of negligence on the part of the defendant.

5. The negligence of the defendant in this case is alleged to be in the movement of the car, at a slight turn in the track, and in the failure to shut the platform gate on the side next to the second track and where the plaintiff stood.

1. *Washington & Georgetown R. R. Co. v. Harmon*, 147 U. S. 571, is reported in 7 Am. Neg. Cas. 359.

The plaintiff said that after the car left Seventh street, it "had gone but a few feet, or a few yards, when he was thrown violently sidewise off the car, and struck a car, as he was told, that was coming in another direction." He was rendered unconscious by the fall, and remained so for some time. Had this been the only evidence of the defendant's negligence, it might well have been held as falling short. Another witness, Mr. Stancliff, who was in company with the plaintiff, gave the following account of the accident: "After starting from the junction at Seventh street and the avenue to go across the Seventh street tracks, the car came to a deflection in the track and it gave a violent side movement, and the plaintiff was pitched from the car; it was a severe lurch from side to side, and the plaintiff's head came in contact with a train coming from the opposite direction."

This "severe lurch" is not shown to have been an extraordinary and unusual one, or attributable to a defect in the track, or the result of dangerous speed at such a place, or the unskillful handling of the car by the gripman. Consequently, negligence of the defendant could not be presumed from the mere happening of the accident. It was said in *Met. R. R. Co. v. Snashall*, 3 App. D. C. 420, 432: "There having been no derailment, no collision, no failure of the means or appliances for transportation, no presumption of negligence on the part of the carrier could be indulged from the happening of the accident itself." That was a case where a passenger on the platform of a horse car fell therefrom at a curve in the track, and it was said that no presumption of negligence of the defendant, or of contributory negligence by the plaintiff, could be indulged from the simple fact of the plaintiff's fall. See also *Weaver v. B. & O. R. R. Co.*, 3 App. D. C. 436, 452.

But in connection with the foregoing, the facts concerning the platform gate are to be considered. It appears from the evidence that all of the defendant's cars are equipped with adjustable platform gates, and that it is the custom to keep them closed, always, on the side next to the other track. On the night in question the cars stopped to take on passengers opposite the National Theater, where a crowd was in waiting. To facilitate the entrance of passengers the gates were opened so that they could get on from that side without going around the end of the car or train. Plaintiff and his friend stepped upon the platform at that point. Defendant's agents failed to close these gates, and the one on the side where plaintiff stood was open at the time that he fell. Plaintiff and his friend both say they did not notice that the gate had been suffered to remain open.

It is contended that, had the gates been closed as usual the plaintiff would have been saved thereby from the fall. Conceding, for the sake of the argument, that this may be but slight evidence of negligence, still it was for the consideration of the jury. Whether the gate, if closed, would reasonably have secured the plaintiff's safety, and whether, if open, he ought to have known it and used greater care, for that reason, are questions of fact, and should therefore have been submitted to the jury, with appropriate instructions as to the law of the case.

There was no law requiring defendant to maintain platform gates and keep them closed on the side next to the second track, and the omission to have such gates at all might not be negligence under any circumstances. But when maintained as a matter of precaution by the defendant, with the knowledge of the public, the failure to close them on this occasion and the probable effect of such failure as contributing to the accident were proper matters for the jury to consider and determine. *B. & P. R. R. Co. v. Carrington*, 3 App. D. C. 101, 111; *Augusta R. R. Co. v. Glover*, 92 Ga. 132, 146.

For the reasons given, the judgment must be reversed, with costs to the appellant, and the cause remanded for another trial. It is so ordered.

HARBISON V. METROPOLITAN RAILROAD COMPANY.

Court of Appeals, District of Columbia, June, 1896.

[Reported in 9 App. D. C. 60.]

STANDING ON FOOTBOARD OF OPEN SUMMER CAR—THROWN FROM CAR—DIRECTING VERDICT.—Where plaintiff walked along the footboard of an open summer car looking for a seat, and was struck, presumably by a car on the other track, and thrown from the footboard and injured, and there was no evidence tending to show defects in track or in the cars or that the cars were recklessly driven, the facts did not warrant recovery by plaintiff and verdict directed for defendant was proper(1).

RIDING ON PLATFORMS OF CARS.—Whilst a passenger may ride on the platform, step or footboard of a car, with the express or implied consent of the carrier, without incurring the imputation of contributory negligence as matter of law, he thereby, however, assumes the increased

1. *Compare Adams v. Washing-* App. D. C. 26, preceding case re-
ton & Georgetown R. R. Co., 9 reported herein.

risk that may result therefrom in the ordinary course of things when the car is properly driven or managed. If hurt during the period of this exposure, he must, in order to recover, show affirmatively that the accident was caused, in whole or in part, by some negligent act of the carrier.

APPEAL, by plaintiff from judgment on verdict directed by the court. The facts are stated in the opinion. *Judgment affirmed.*

O. B. HALLAM, for appellant.

NATHANIEL WILSON, for appellee.

Shepard, J. — This is an action for damages for personal injuries, and the question on this appeal is, whether the court erred in directing a verdict for the defendant upon the close of the testimony on behalf of the plaintiff.

By reason of its particular facts, the case is clearly distinguishable from that of *Adams v. Washington & Georgetown R. R. Co.* ante p. 26, [9 App. D. C. 26], the judgment in which was reversed because the case had been taken from the jury by a direction to find for the defendant (1). By analogy, we think it comes within the principle of *Weaver v. B. & O. R. R. Co.*, 3 App. D. C. 436 (2), and that the court did not err in the instruction to the jury.

The facts shown by the evidence of the plaintiff are these: The defendant, the Metropolitan Railroad Company, has a double track, the inside rails of each of which are four feet apart. The charter of the company required the rails to be not less than four feet and not more than six feet apart, and to be located under the supervision of the municipal authorities. May 12, 1894, the plaintiff, James M. Harbison, accompanied by a girl eight years of age, who was in his charge, took passage in a horse car going east, at F and Seventh streets. It was an open summer car, with benches running entirely across it, from side to side. The means of entrance was by a foot-

1. See the preceding case reported.

2. *WEAVER v. BALTIMORE & OHIO R. R. Co.*, 3 App. D. C. 436 (1894), was an action for damages for the negligent killing of plaintiff's intestate, a government railway postal clerk, whose death was caused by striking his head against a bridge post while catching a mail bag. On the trial judgment was rendered for the railway company, which, on appeal, was affirmed. The court held that whilst the plaintiff's intestate is

to be considered as a passenger, it cannot be presumed, from the mere fact of his having been killed while *en route*, that the injury was caused by the negligence of the defendant. That he was found dead in the car, killed by coming in contact with the bridge post, does not of itself shift the burden of proof to the defendant. The burden is always upon the plaintiff to make out his case. Where negligence furnishes the cause of action it must be proved by the party alleging it.

board running along each side of the car, from end to end. The width of this footboard was not given; but it was shown that it was seventeen inches from its outer edge to the nearest rail of the track on which the car ran. The plaintiff, after mounting the footboard, on the side next the other track, and whilst standing there, paid his and the child's fare to the conductor, who was standing thereon also, and nearer the front platform. The conductor then moved to the front. The car was somewhat crowded, and there was but one vacant seat on the bench next him in which he seated the child. The conductor rang the bell for starting after receiving the fares and before moving to the front. Plaintiff walked along the footboard towards the rear of the car, looking for a place to sit. Before reaching the end he was struck in the rear and thrown from the car. He did not see what struck him; but it is evident that he came in contact with a closed car on the adjacent track that was moving in the opposite direction. No attempt was made to prove the width of the car. It is conceded, however, that it extended no further beyond the rail than the open car, if in fact so far. No passenger saw how the plaintiff was thrown from the car. There was no testimony whatever tending to show that there was any defect in the tracks which might have caused the cars to lurch and come closer together than usual, or in the cars themselves that might have the same effect. There was nothing peculiar in the construction of the cars and nothing protruding from the side of the closed car that added to the ordinary danger in passing. There was no evidence that either car was recklessly driven or at a speed that would cause it to lurch more than usual from side to side.

The appellant contends that, to the facts as stated, the maxim *res ipsa loquitur* applies; that, being a passenger upon the car, a presumption of negligence arises from the happening of the accident, which the defendant is called on to rebut.

Answering the same contention in *Weaver v. B. & O. R. R. Co.*, 3 App. D. C. 436, 452 (1), we said:

"The burden is always upon the plaintiff to make out his case. Where negligence furnishes the cause of action it must be proved by the party alleging it. There are some cases in which it has been said that the law presumes negligence on the part of the carrier from the mere happening of an accident to a passenger. This is not a strictly accurate statement of the law. The most that can properly be said is that when an injury occurs through some accident to the

1. See note of this case on page 169, *ante*.

means of transportation which is under the management of the carrier's employees, and which, if they exercise proper care, cannot ordinarily happen, it affords reasonable evidence in the absence of explanation, from which negligence may be inferred. *Transportation Co. v. Downer*, 11 Wall. 129; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 555; *Railroad Co. v. State* (use of Mahone), 63 Md. 135; *Curtis v. R. R. Co.* 18 N. Y. 543; *Railroad Co. v. Gibson*, 96 Pa. St. 83; *Railroad Co. v. Robinson*, 73 Tex. 277; *Scott v. London Docks Co.*, 3 H. & C. 596 (1); *Railroad Co. v. Snashall*, 3 App. D. C. 420, 432 (2). In this case there was no derailment of the car, no injury to it or the track, no accident of any kind affecting it, or that could have affected any passenger inside the cars. There is no legally established fact upon which to found the presumption or inference of negligence on the part of the defendant. The sole foundation for the inference of negligence exists in the fact that intestate was instantly killed by coming in contact with the post of a bridge, which is not as wide as is now customary in the construction of new bridges."

Nor is there any foundation for the contention of appellee, that contributory negligence must be presumed from the fact that plaintiff remained on the footboard in a place of danger, instead of at once entering the car. *Adams v. W. & G. R. R. Co.* *supra*. The length of time that the double tracks had been in operation does not appear; but the same summer cars had been in use for about a year and plaintiff had been in the habit of riding on them. There was no evidence that there had ever been a similar collision or accident.

It cannot be said, as matter of law, that the tracks were too close together for ordinary safety. Having been located according to the Act of Congress, and subject to the approval of the authorities

1. In *SCOTT v. LONDON & ST. KATHARINE DOCKS COMPANY*, 3 H. & C. 596, an action for personal injury caused by the alleged negligence of the defendant, it was held that the plaintiff must adduce reasonable evidence to warrant the judge in leaving the case to the jury. But where the instrument or machinery is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the

management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In the action the plaintiff proved that he was an officer of the customs, and that, while in the discharge of his duty he was passing in front of a warehouse in the docks, six bags of sugar fell upon him:—Held, reasonable evidence of negligence.

2. See note of this case on page 168, *ante*.

charged with the control of the streets and the regulation of their use, the presumption would lie, in the absence of proof to the contrary, that they were at a safe distance apart.

Had the other car been an open summer car, like that on which the plaintiff stood, there would have been at least fourteen inches between their respective footboards as they passed each other, unless reduced by a defective track or unusual speed at the time.

The width of the footboard is not given, but it was necessarily wide enough for a man to stand and walk upon, while holding to the standards of the car and the hand rails thereon. As the other car was a closed one, the danger of collision was certainly not increased by the fact that no passenger could diminish the open space by standing outside of it.

It must be borne in mind, too, that there was no proof whatever, that there had been an increase in the width of cars since the construction of the tracks or that either of the cars in question was of an extraordinary or unusual width as compared with those that had been customarily used.

We think the doctrine a reasonable one, and agree with the Court of Appeals of New York in saying in a case much like this: "The defendant was not bound to so construct its tracks that it would be impossible for a passenger to be struck by another car while he was standing on the outside of an open car." *Craighead v. Brooklyn City R. R. Co.*, 123 N. Y. 391, 395.

The true rule surely must be that whilst a passenger may ride on the platform, step or footboard of a car, with the express or implied consent of the carrier, without incurring the imputation of contributory negligence as matter of law, he thereby, however, assumes the increased risk that may result therefrom in the ordinary course of things when the car is properly driven or managed. If hurt during the period of this exposure, he must, in order to recover, show affirmatively that the accident was caused, in whole or in part, by some negligent act of the carrier. *McAfee v. Huidekoper*, *ante* p. 36 [9 App. D. C. 36] (1); *Adams v. W. & G. R. Co.*, *ante* p. 26 [*supra*] (2); *Stewart v. R. R. Co.*, 146 Mass. 605.

1. **McAFEE v. HUIDEKOPER** (**REC'D**), 9 App. D. C. 36 (1896), was an action for damages for injuries sustained by plaintiff while passing from one car to another while the train was in motion. The jury were directed to return a verdict for defendant. On appeal by plaintiff the

court held that by the rule in *Adams v. Washington & Georgetown R. R. Co.*, 9 App. D. C. 26, 9 Am. Neg. Cas. 163, *ante*, the court below erred in directing verdict for defendant, as the case should have been submitted to the jury. Judgment reversed.

2. See preceding case reported.

That negligence may be presumed from the happening of the accident under the circumstances and in the manner referred to hereinabove, or it may be matter of reasonable inference by the jury from the facts and circumstances given in evidence. But conjecture is not sufficient.

"No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed." *United States v. Rose*, 92 U. S. 281; *Manning v. Insurance Co.*, 100 U. S. 693; *Weaver v. B. & O. R. R. Co.*, 3 App. D. C. 436, 455 (1).

The points indicated above mark the essential difference between this case and that of *Geitz v. M. C. R. R. Co.*, 72 Wis. 307, which has been greatly relied on by the appellant. In that case the question of negligence was left to the jury because there was evidence tending to show that the car on the adjacent track which struck the plaintiff, was being driven at an unusually rapid rate of speed that caused it to lurch and sway from side to side much more than usual. It was properly left to the jury to ascertain whether this extraordinary speed and consequent swaying of the car beyond the ordinary limit had an appreciable effect in producing the accident. There was no such evidence in this case. Taking the evidence as a whole and giving the plaintiff the benefit of every legitimate inference that can be deduced from it, there is no foundation upon which a verdict in his favor could stand (2).

The judgment must therefore be affirmed, with costs to the appellee. And it is so ordered.

Rehearing denied.

PASSENGER INJURED BY BEING PUSHED FROM STREET CAR—IMPENDING DANGER—TRAIN APPROACHING WHILE STREET CAR CROSSING TRACK—GATES CLOSED—JOINT LIABILITY—DAMAGES.—Action by Margaret L. Hickey and John P. Hickey against The Washington & Georgetown Railroad Company and The Baltimore &

1. See note of this case, page 169, *ante*.

2. In *WASHINGTON & GEORGETOWN R. R. Co. v. WRIGHT*, 7 App. D. C. 295 (1895), it appeared that plaintiff while standing in a crowd on or near a street railway track reading election bulletins, was struck

by one of defendant's cable cars and injured. Held, that plaintiff's contributory negligence prevented recovery, whether defendant was guilty of negligence or not, and judgment for plaintiff for \$5,000 was reversed. The court below should have directed verdict for defendant.

Potomac Railroad Company to recover for injuries sustained by Mrs. Hickey, one of the plaintiffs, occasioned by the joint or concurrent negligence of the agents or servants of the two railroad companies. Verdict for plaintiffs. Each of the defendants moved for new trial. Motions overruled upon condition that half the amount of the verdict be remitted and remittitur accordingly entered. Judgment entered upon the verdict for \$6,000 and costs. From this judgment each of the defendants appealed. On the appeal the court (per ALVEY, CH. J.) said: "It is shown by the evidence that the street car was an open summer car, crowded with passengers; and that when it approached the crossing, according to the testimony of some of the witnesses, it proceeded with more than ordinary speed. As this street car neared the crossing an east bound train on the steam car tracks approached the intersection of the tracks of the two roads; and this approaching train was plainly in view of both the driver of the street car and the gatekeeper, if they had been on the lookout for it. It appears that, as the street car approached the crossing, the gates were partially lowered, and the street car, if it did not actually stop, slackened its speed; but at that moment the gates were raised and the street car proceeded to cross the tracks of the steam car road in front of the approaching train. This, as the result showed, would have been entirely successful, and without producing alarm and terror to the passengers, though exceedingly perilous, but for the fact, that, just as the street car got upon the steam car tracks, the gates were let down again, the south arm of the gates falling about the manes of the horses, and the north arm over the top of the street car; and thus catching the street car immediately on the tracks of the approaching steam car train, and which at that moment according to the testimony of some of the witnesses, was only about fifty or sixty feet distant from the crossing. The passengers in the street car were at once naturally stricken with excitement and terror, many jumping from the car, and in the midst of the commotion and confusion, Mrs. Hickey, the female plaintiff, was either pushed or she jumped from the car, and fell upon the ground, and, in some way, not very clearly shown, one of her feet was caught and most seriously injured—whether by contact with the wheels of the car, or in some other way, may admit of some question. She thinks and testifies that the wheel of the car passed over her ankle, and produced the injury to it. In whatever way the injury may have been received, the evidence shows clearly that it was very serious. In the midst of the excitement and confusion produced by the lowering of the gates and the obstruction of further progress of the street car, the gates were again raised, and the street car moved on, barely succeeding in escaping collision with the passing train of steam cars. The fault of the gatekeeper seems to have been, in not lowering the gates in time to keep the street car from attempting to cross the steam railway tracks, and in lowering the gates when the street car was immediately on the steam car tracks, and thus preventing, for the moment, further advancement. The fault of the street car driver was in the reckless approach to the crossing, and attempting to

cross, when he saw, or should have seen, the near approach of the steam car train to the crossing. Without the fault of both the gatekeeper at the crossing and the driver of the street car, it is not at all probable that the accident would have occurred.

"As preliminary to the consideration of the questions that relate in common to both the defendants, there are some two or three questions specially raised as applicable to the one or the other of the defendants separately. The first of these is the question raised on the motion in arrest of judgment by The Baltimore & Potomac Railroad Company. This motion is based upon the supposed failure of the plaintiffs to allege in the declaration that the gatekeeper at the crossing, to whom negligence was imputed, was a servant of The Baltimore & Potomac Railroad Company; and because of the supposed failure of the declaration to aver that the said railroad company was bound by any duty in connection with the gates at the crossing.

"The declaration may not be very artistically drawn or full in its averments, but we think there is enough in the averments of the declaration, after trial and verdict, to sustain the judgment for the plaintiffs. The declaration avers that the defendants and each of them, and their and each of their servants and employees, so carelessly and negligently conducted themselves, that as the street car approached the crossing, the gatekeeper 'who was operating the gates or guards at said crossing, erected for the purpose of preventing damage to vehicles and foot passengers, negligently allowed the driver of the street car to drive the same,' etc. This averment must be read in connection with and as preliminary to the more general and comprehensive averment that follows; viz: 'That the injuries occasioned to the female plaintiff were caused by the gross carelessness and neglect of said defendants and each of them, their and each of their servants and employees.'

"It is a settled principle of pleading, that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on a demurrer, yet, if the issue joined (in this case on the general issue) be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured. 1 Wms. Saund. 228; *Township of Lincoln v. Cambria Iron Co.*, 103 U. S. 412, 416. At most, the supposed defect in the declaration is but a defective statement of a good cause of action, and not the statement of a defective or insufficient cause of action; and in such case the verdict always cures the defect. We do not say, however, that the declaration would have been adjudged bad on demurrer. It was not necessary to make a specific averment in the declaration that the gatekeeper was the servant of the railroad company, or that the latter was bound to maintain the gates. It was sufficient to allege that the injury complained of was occasioned by the negligence of the defendants, or their servants. *Bank of Metropolis v. Guttschlick*, 14 Pet. 19. And for a like reason there was no error in overruling

the objection of the Baltimore & Potomac Railroad Company to evidence offered by the plaintiffs to prove that the gatekeeper was the servant or employee of that company, and for whose negligence that company was liable." * * *

"The defendant, The Baltimore & Potomac Railroad Company, requested the court to instruct the jury, that under the pleadings and evidence the plaintiffs were not entitled to recover as against that company; and the other defendant, the Washington & Georgetown Railroad Company, requested that the jury be instructed, that if the injury to the female plaintiff was caused by her being shoved or pushed from the car in the rush of passengers and confusion resulting from the sudden and negligent lowering of the gates at the crossing, as previously described, then there was no evidence that the conduct and management of the street car entered into or contributed to the negligence of the gatekeeper, and the verdict should be in favor of that company.

"The court below refused to give either of these proposed instructions, and we think very rightly refused to give them. There was evidence before the jury to be considered by them amply sufficient to affect both defendants with liability for the injury, if that evidence was allowed full credence. It was the clear duty of the gatekeeper to keep strict watch, not only for the approach of the locomotive trains, but for the approach of the street cars, and to let down the gates in such full and ample time as would certainly prevent the street cars from entering upon the crossing at a time when there was danger of collision with an approaching locomotive train. In this instance, this duty appears not to have been performed by the gatekeeper. The letting down the gates upon the street car when the latter was immediately upon the crossing, with the locomotive train in such near approach, was more than ordinary negligence; it would appear to have been a reckless indifference to the safety of human life. And the conduct of the driver of the street car was scarcely less reprehensible. He must have seen the near approach of the train, and therefore the danger of attempting to cross the tracks in front of the locomotive. If he did not see the approaching train, it was because of his negligent failure to keep a lookout for the safety of his passengers. The train was plainly in view, and he did see or could have seen it before he reached the crossing, and in time to avoid the peril of the attempt to cross. His failure to observe the proper precautions before attempting to cross the tracks of the steam railroad amounted to gross negligence, and a reckless want of care for the safety of his passengers.

"Both defendants, by their servants and employees, having been guilty of negligence and thereby contributed to the production of the injury complained of, are equally liable for such injury. The rule is well established, that where a person suffers an injury from the joint or concurrent negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally for such injury, and no mere comparative degree of care required, or comparative degree of culpability shown, will affect the

liability of either of the defendants. *Bunting v. Hogsett*, 139 Pa. St. 363; *Gulf, etc., R. R. Co. v. McWhirter*, 77 Tex. 356; *Rankin v. Central P. R. R. Co.*, 73 Cal. 93." * * *

"There is a question made upon the fourth prayer of the plaintiffs, which was granted, to the effect that its terms were too suggestive of excessive damages. But, assuming that the jurors were men of ordinary intelligence, we do not think they could have been misled by the terms of the instruction. They were simply told, that if they found for the plaintiffs they should award such damages, within the limits of the sum claimed in the declaration, *as would fairly and reasonably compensate* the female plaintiff for the injuries suffered by her. The jurors must have understood that fair and reasonable compensation was the limit of the award of damages, under the instruction. The amount of damages laid in the declaration was \$30,000, and the verdict was for \$12,000, so that there was nothing in the verdict to indicate that the jury acted upon the idea that the amount claimed in the declaration, in any way, furnished the criterion for determining the amount of compensation to be awarded to the plaintiff. We must suppose that the jurors paid heed to the terms of the instruction, and only awarded such sum as, in their judgment, was a fair and reasonable compensation to the female plaintiff for the injury she had received." (The plaintiff's foot and leg were crushed by the wheels of the car and she sustained severe cuts and bruises in various parts of her body.) Judgment affirmed. *W. D. DAVIDGE* and *W. D. DAVIDGE, JR.*, appeared for appellant, *The Washington and Georgetown Railroad Company*; *SAMUEL MADDOX*, for appellant, *The Baltimore and Potomac Railroad Company*; *GEORGE E. HAMILTON* and *M. J. COLBERT*, for appellees. *Court of Appeals, District of Columbia, March, 1895. Washington & Georgetown Railroad Company v. Hickey*, 5 App. D. C. 436.

PASSENGER RIDING IN EXPRESS CAR—INJURED IN COLLISION—DANGEROUS PLACE—RULES OF RAILROAD—INSTRUCTIONS.—In an action to recover damages received by *Walter J. Hirst* while riding on a passenger train of defendant due to a collision between that train and another train loaded with iron rails, the evidence showed that *Hirst* on boarding the train got on the passenger car, and that a rule of the railroad company forbade passengers from riding in any other than passenger cars, or, consequently, in the express car, in which car *Hirst* had gone and was at the time of the accident, he being about six feet from the fore end of it, and sitting on the iron express box; and that the plaintiff knew of such rule; and also to the effect that this car was next to the engine and was a more dangerous place than the passenger cars, and was neither set apart as, nor was it in fact, the place where passengers usually rode, and was not arranged for them, nor had any seats, but was for the use of the express company. Also that the plaintiff had ridden in the express car previously to the

trip on the day of the accident in question, and that the conductor had been in there with him a short time, and that plaintiff had gone in there with the conductor and by his permission, or with his, at least, tacit consent. The evidence also tended to show that the plaintiff was in this car at the time of the collision; that there was ample room in the passenger car, and that plaintiff would not have been injured if he had been there, and that he and the express agent were the only persons injured. There was no testimony tending to show that the conductor attempted to enforce the rule or even suggested to the plaintiff the advisability of its observance, although the conductor says that plaintiff was not in the car by his permission. Hirst had not paid any fare, nor had the conductor applied to him for it. On the trial in the Circuit Court for Alachua county exceptions were taken by defendant to charges given to jury, and to the refusal of one asked by defendant, which the Supreme Court said involved an inquiry into the legal effect of a railroad company forbidding passengers to ride in parts of the train set apart for other purposes, and naturally more dangerous than passenger cars, and of the power of conductors to waive such rules. The court discussed the questions at some length, citing numerous authorities. Among its rulings the court (per *RANNEY*, CH. J.), held that:

The law requires of railroad companies the exercise of the highest degree of care for the safety of passengers travelling upon their trains; and it authorizes such companies to make, and requires passengers to observe all rules reasonably necessary for the safety of the latter. A rule of a railroad company requiring that passengers shall remain in the cars provided for them, and, consequently, that they shall not ride in an express car, or other place of increased danger, set apart for another purpose, is reasonable.

It is contributory negligence for a passenger to ride in an express car, even with the permission, connivance or knowledge of the conductor of the train, or without his protestation against it, when the conductor is cognizant of the rule and of its infraction, if by such violation of the rule the passenger brings upon himself injury from which he would have escaped, notwithstanding that the negligence of the company produced the accident, had he remained in the passenger car set apart, and affording space, for his accommodation.

It is the duty of the conductor of a railroad train to enforce a rule of the company requiring passengers to ride in the passenger cars, but the obligation upon passengers and the protection to the company, of a rule of this kind, is not dependent upon the fidelity of the conductor or other agent charged with its enforcement.

Where a passenger who knows of a rule requiring him to ride in the passenger cars, rides in an express car or other place on the train which cannot be regarded as intended for accommodation of passengers, but naturally suggests that it was not intended for them, the burden is upon him to prove that he was justified in riding in such prohibited place.

If a railway company which has a rule prohibiting passengers

from riding in the express car, or in other cars than the passenger cars, habitually permits passengers to ride in the express car, it will incur the same responsibility to passengers for injuries received by them, through the company's negligence, when riding in the express car as if they were in a passenger car.

Though a passenger, who riding in an express car, receives an injury, knows at the time that there is a reasonable rule of the company prohibiting his riding there, cannot invoke the mere delinquency of the conductor in enforcing the rule as a bar to the company's claiming the protection of the rule, still a company may by its conduct abandon the rule, or preclude itself from protection thereunder. It may, by its conduct, have held out its employees in control of its trains, as authorized, notwithstanding such a rule, to consent to plaintiff's riding in an express car; or its employees may have been accustomed to allow passengers to ride in the express car so generally and constantly that the officers of the company must be held to have known of and acquiesced in the violation of the rule; or there may have been such continued and habitual disregard of the rule by the employees as must have reasonably produced the belief that the company had practically abandoned its rule. There must be such conduct as in effect establishes the concurrence of the company in the disregard of the regulation.

It is error to submit a case to a jury upon the theory that the virtue or efficiency of a rule prohibiting passengers from riding in express cars is entirely dependent upon the fidelity of the conductor or other agent charged with its enforcement.

Where a party has inflicted an injury intentionally, or where it has been done through negligence and hence unintentionally, and his conduct in doing it has been wanton or reckless of its injurious consequences, the contributory negligence of the person injured is not a defense to an action brought by him for such injury.

The use of the expression "gross negligence" in a charge to a jury does not of itself define, nor does it include only, that extreme degree of negligence which is wanton or reckless of its injurious consequences, and to which the defense of contributory negligence does not obtain; and can not be held as having been intended to submit the case to a jury for consideration as one of that character, and particularly so where other charges have recognized contributory negligence as a defense to the action.

Exemplary damages can be allowed in cases of negligence, only where the negligence is of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects; or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness, or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. As "gross negligence" is not confined to this extreme degree of negligence, it is not proper to charge

a jury simply that gross negligence will justify the imposition of such damages. Judgment reversed, J. R. PARROT and ROBERT W. DAVIS, appeared for appellant; E. C. F. SANCHEZ, for appellee. Opinion by RANEY, CH. J. *Supreme Court, Florida, June Term, 1892. Florida Southern Railroad Company v. Hirst*, 30 Fla. 1.

AUGUSTA AND SUMMERVILLE RAILROAD COMPANY v. RENZ.

Supreme Court, Georgia, July Term, 1875.

[Reported in 55 Ga. 126.]

ACCIDENT ON STREET RAILROAD CURVE—EVIDENCE.—Upon the trial of a suit against a street railroad company for an injury sustained by careless driving over a sharp curve and sudden elevation, it was competent to show that the defendant had altered the curve since the accident.

STANDING ON PLATFORM OF STREET CAR.—The standing on the platform of a street railroad car, in the absence of notice to the contrary is not such negligence on the part of the plaintiff as to prevent his recovery for damages sustained by reason of the negligent conduct of the employees of the railroad company.

PLEADING.—Though a cause of action may be defectively set forth, the defect is cured by the verdict.

RUNNING OF STREET CARS ON SUNDAY.—This court is not prepared to hold that the running of street railroad cars on Sunday in cities and the vicinity thereof is not a work of necessity, as contemplated by section 4579 of the Code, and that it is unlawful to run the same on such day.

FROM Richmond Superior Court. *Judgment for plaintiff affirmed.* The facts appear in the opinion.

FRANK H. MILLER, for plaintiff in error.

H. CLAY FOSTER, for defendant.

Warner, Ch. J. — The plaintiff brought his action against the defendant to recover damages for injuries sustained by him as a passenger whilst being transported on its road, in consequence of the alleged careless, negligent and unskillful management of the defendant, its servants and agents, in operating its cars and coaches upon its said road, whereby he was thrown from its car and his arm broken, to his damage \$5,000. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$1,250. The defendant made a motion for a new trial, on the several grounds therein stated, and also made a motion in arrest of judgment, both of which motions were overruled, and the defendant excepted.

It appears from the evidence in the record that there was a short, steep curve in the defendant's road; that in passing it the driver of the car put whip to the horses drawing it, so as to enable them to surmount the steep curve with the loaded car, which was done so suddenly as to throw the plaintiff off the platform of the car, where he was standing, breaking his arm. The car was full of passengers, some standing on the platform; the plaintiff was standing on the platform of the car when the conductor received his fare.

1. The main question in the case was whether the evidence showed that the plaintiff was injured by the carelessness and negligence of the defendant in conducting its business as the carrier of passengers for hire on its road. The defendant made several requests of the court to charge the jury, which were refused, and instead thereof it charged the jury the law applicable to the facts of the case, as contained in the 3033d and 3034th sections of the Code. We find no error, in view of the evidence contained in the record, in the refusal of the court to charge as requested, or in the charge as given. The sections of the Code before cited embraced the correct principles of the law applicable to the facts in the case. There was no error in allowing the witnesses to testify that since the injury to the plaintiff the defendant had altered the curve in its road. The alteration was a fact which it was competent for the plaintiff to prove for the consideration of the jury, subject to be explained by the defendant why the alteration was made.

2. The standing on the platform of a street railroad car, drawn by animal power, is not such an exposure to danger by a passenger as the standing on the platform of a railroad car drawn by a locomotive operated by the power of steam, the more especially, as in this case, when there was no notice given not to stand there.

3. There was no error in overruling the defendant's motion in arrest of judgment. There was a cause of action set forth in the plaintiff's declaration, and though it may have been defectively set forth, it was cured by the verdict.

4. In view of the dependence of the people for travel, in the cities where street railroads have been established, by that mode of conveyance in going to church, visiting the sick, etc., we are not prepared to hold that the running of street railroads in cities and the vicinity thereof, where the same have been established, on Sunday, is not a work of necessity, as contemplated by the 4579th section of the Code, and that it is unlawful to run the same on that day.

The jury having found in favor of the plaintiff as to the question of negligence and carelessness on the part of the defendant, and as to the fault of the plaintiff, and there being no material errors in the rulings of the court as to the law applicable to the facts of the case, and there being sufficient evidence in the record to sustain the verdict we will not interfere with the exercise of the discretion of the court in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

THE CENTRAL RAILROAD v. SANDERS.

Supreme Court, Georgia, September Term, 1884.

[Reported in 73 Ga. 513.]

INTERROGATORIES—AMENDED DECLARATION.—Where an action was brought against "The Central Railroad and Banking Company," and interrogatories were taken out, crossed and executed, the name of the defendant being so stated in them, and subsequently the declaration was amended by inserting after the name of the defendant the words, "of Georgia, lessees of the Southwestern Railroad Company," the interrogatories previously executed were not thereby rendered inadmissible.

INTERROGATORIES.—Whether interrogatories should have been suppressed or not, if the question of the amount of damages, to which alone they related, is waived, the ruling of the court as to the interrogatories is immaterial.

RAILROAD ACCIDENT—PRESUMPTION OF NEGLIGENCE.—Where one is injured by the running of a car and engine of a railroad company, the law presumes that such injury was the result of negligence on the part of the company, and to relieve itself of such presumption, it must show that it used all ordinary care and diligence to prevent the injury. It is not enough for them to insist that they do not know how the accident occurred, and that it is impossible for them to find out.

DERAILMENT OF TRAIN.—It appeared in this case that the company did not have a suitable track; that the outside of the curve where the accident occurred was lower than the inside; and that the train was behind time and was running rapidly to catch up, when the train left the track, causing the injury sued for. A verdict for the plaintiff was, therefore, not without evidence of negligence to support it.

FROM Quitman Superior Court. *Judgment for plaintiff affirmed.*

Georgia Sanders brought suit against the Central Railroad for a personal injury, laying her damages at ten thousand dollars. The defendant pleaded the general issue. On the trial, there was no conflict of evidence as to the fact that a train on the Southwestern Railroad (which was controlled by the Central Railroad under lease)

ran off the track while passing around a curve, and that the plaintiff was injured; but the evidence as to the diligence or negligence of the railroad was voluminous and conflicting. It is unnecessary to set it out in detail, but it is sufficient to state that the principal points relied on by the plaintiff were as follows: The train was seven or eight miles behind its schedule time just before reaching the curve, and was running more rapidly than the schedule time, in order to catch up. It left the track on the outer side of the curve, tearing away the rail and stringers on which it rested for a distance of fifty to seventy-five yards. The track and the wreck were examined shortly after the accident. In one of the stringers a crack was found extending nearly half way through it, and along the edges of the stringers were some rotten places. A witness for the plaintiff testified that, from his examination, he was of the opinion that the cause of the accident was that the outer side of the curve was lower than the inner side, while the contrary should have been the case. Another witness testified that he examined the track the next day, and that the outside of the curve was two and a half or three inches lower than the inside; that the track had been temporarily repaired, and he, being in the employment of the road, went there to repair it. There was testimony that the supervisor of the road was at the place of the injury after its occurrence; that he appeared to have been drinking, and indulged in some profanity and abuse of the conductor, saying that it was carelessness and looked like he had been running thirty miles an hour. These sayings of the supervisor appear to have been admitted for the purpose of impeaching him. There was also evidence as to the extent of the injury.

The principal points of contest relied on by the defendant were as follows: The track at that point was properly laid with good material. It had recently been repaired, and several agents and employees of the road testified that they had been over that portion of the track shortly before the injury, and that it appeared to be in good condition. While the speed was somewhat faster than the schedule time, it was not an unusual or dangerous speed; and the track being in good condition, there was no more danger of an accident in running around a curve than on a straight track. The stringers were sound and the rails good. The crack in one of the stringers was a mere sun-crack, and it was not in an unsound condition. The tearing up or splintering of timbers was such as might have occurred as the result of such an accident wherever it happened and however sound the rails may have been. One witness testified that where a track was in good condition, it could not be told what

caused the accident, and that he had seen accidents on straight lines as well as on curves. The engineer testified that his engine was in good condition, and he thought the cars jerked it from the track. Another witness testified that the cars were in good condition. Several other trains had passed over that portion of the road on the day when the injury occurred, and had the outer rail been lower than the inner one, they would have left the track.

There was some conflicting evidence as to the putting in of a short stringer in one portion of the curve, and as to whether it was put in before or after the injury, but it appeared that it was not at the exact point where the train left the track.

The jury found for the plaintiff \$2,500. Defendant moved for a new trial, which was refused, and it excepted.

W. S. WALLACE & SON, for plaintiff in error.

T. H. PICKETT, J. H. GURRY, by C. B. WOOTEN, for defendant.

Blandford, J. — The defendant in error brought her action against the plaintiff in error and obtained a verdict and judgment. The defendant moved for a new trial on various grounds, which motion was overruled by the court below, and defendant excepted, and error thereon is assigned to this court.

1. The action was originally brought against the Central Railroad and Banking Company. The declaration was subsequently amended, without objection, by adding the words "Central Railroad and Banking Company," "of Georgia, lessees of the Southwestern Railroad Company." While the action remained against the Central Railroad and Banking Company, and before amendment, certain interrogatories were sued out for Georgia Sanders and others, and the case was stated on the interrogatories as it appeared originally in the declaration. The declaration having been amended as above stated, when the depositions were returned into court, counsel for plaintiff in error moved to suppress the same, upon the ground that when the interrogatories were sued out, there was no case against the plaintiff in error in court. This motion was refused by the court below, and this forms the first ground of complaint by plaintiff in error.

When the declaration was amended, there was a good case against the defendant. This amendment was more formal than real; the misnomer was so amended as to make the declaration speak the truth as to the name of defendant. The defendant was fully advised by the interrogatories of plaintiff as to the case the witness was to be examined about. The questions were full, and the crosses of defend-

ant were likewise full as to all matters embraced therein. We think the testimony was admissible, and the court did right to refuse to suppress the same. See *Wright v. Zeigler Bros.*, 70 Ga. 502.

2. The defendant moved to suppress other interrogatories, after the amendment to plaintiff's declaration had been made, on account of some informality as to the statement of the case in the interrogatories. Whatever merit there may have been in this motion when made, the plaintiff in error having waived the ground in its motion for new trial that the verdict was excessive, and as this testimony goes alone to the injuries received by plaintiff, which bears alone upon the question of damages, the ruling of the court below on this motion, whether right or wrong, is quite immaterial; and if wrong, under the present aspect of the case, would not work a reversal.

3. It is insisted by the able and ingenious counsel for plaintiff in error that the verdict is not supported by the evidence. When one is injured by the running of the cars and engines of a railroad company, the law presumes that such injury was the result of the negligence of the railroad company, and such company, to relieve itself of such presumption, must show that it used all ordinary care and diligence to have prevented the injury. It is admitted by counsel for plaintiff in error that the company did not know how this accident occurred; that it is impossible to find out. But we submit that, notwithstanding the ignorance of the company as to the cause of the accident, the presumption still exists of negligence on its part. The defendant must show, to rebut the presumption, that it used all ordinary care and diligence.

This record shows affirmatively that the company was negligent in not having a suitable track; that the outside of the curve was lower than the inside; that the train was behind its time and was running rapidly to make up; all these things were in evidence and submitted to the jury. The judge who tried this case was satisfied with the verdict,—at least he refused to interfere with the same. Where there is evidence to support the verdict, and the judge who tries the case refuses to grant a new trial, this court will not interfere.

Judgment affirmed.

THE CENTRAL RAILROAD V. SENN.

Supreme Court, Georgia, September Term, 1884.

[Reported in 73 Ga. 705.]

PASSENGER INJURED IN DERAILMENT OF TRAIN—DAMAGES

—EVIDENCE.—In an action for damages brought by a passenger against a railroad company, for injuries which plaintiff sustained by the cars, on which she was a passenger, running off the track, which was alleged to have been caused by the carelessness and negligence of the company in the construction of its track and the running of its cars, the plaintiff being introduced as a witness in her own behalf, should not be allowed to state how much, in her opinion, was her loss by her inability to labor. The witness cannot give an opinion as to the amount of the damages, but must state facts, and let the jury say from the facts what is the amount of the damages.

DERAILMENT—EVIDENCE—EXPERT.—Upon the trial of such a case, any witness may give an opinion as to what caused the train to run off the track, provided the witness states the reasons upon which the opinion is predicated. One who is an expert may give an opinion without stating his reasons.

OPINION—EVIDENCE.—It is a general rule that, wherever an expert can give an opinion without the reasons upon which it is based, any other witness, who knows facts upon which he can form an opinion, may state his opinion, by giving the facts upon which he bases it.

DAMAGES—INSTRUCTION.—In an action against a railroad company for damages to the plaintiff, caused by the car, upon which she was a passenger, running off the track, and where damages are claimed, both for physical pain and suffering from wounds received by her, and also on account of loss of business and inability to labor, it is error for the court to charge the jury in the following language, without any qualification: "In some torts the entire injury is to the peace, happiness and feelings of the plaintiff. In such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors."

CHARGE—EXCEPTION.—Where the entire charge is not sent up in the bill of exceptions or in the record, and the portion of the charge excepted to is error, without qualification, and when the judge who tried the case makes no statement in his certificate which shows that it was qualified by other parts of the charge, this court will presume that there was no qualification.

FROM Muscogee Superior Court. *Judgment for plaintiff reversed.*

"To the report contained in the decision, it is only necessary to add, in connection with the second and third divisions thereof, the following grounds of the motion for new trial:

"3. Because the court permitted Domingoes, a witness for the

plaintiff, in rebuttal, after stating that he was not an expert, and testifying that before the run-off there was a jerking, bounding sensation, so that one could hardly walk in the car, but that he did not go back and look at the track after the accident, and that there had been some conversation excited by the motion and jerking, and giving his reasons for the opinion, to testify that from what he saw and felt, his opinion was as follows: 'I think, sir, on a curve, when the car is running, the centrifugal force of the flange of the wheel against the iron rail is increased by the increase of the speed. We were running very fast, and my opinion is that the pressure must have been very great in consequence. Our sensation was not a rolling, but was a bounding; it gave the opinion to me that we had not mounted the track, but that the track had spread and we were between; and my opinion is that the speed we were going at torced the track apart and caused the run-off.'

"4. Because the court refused to rule out this testimony, on motion made thereof, on the ground that 'such opinion was founded upon an assumption of the condition of the track being defective,—whereas the said witness had, during said examination, testified that he did not know what the condition of the track was,—and upon a theory given by the witness when he had also testified that he did not scientifically understand, and because such opinion was not given on facts.'

"5. Because the court permitted Clement, a witness for the plaintiff, not an expert, after giving his reasons for his opinion, to testify that 'the train was running a curve, and the outside rail gave way and threw the car from the track.' Objected to as being matter of opinion.

"6. Because the court permitted Hatcher—a witness for the plaintiff, in rebuttal, in answer to a question, to state to the jury what he found upon examination of the track after the cars had run off, and as to the condition of the track, and having given the facts, then to state his opinion as to what caused the cars to run off—to testify as follows:

"My opinion of it is this, that from the compression of that end of the rail *it raised that*, and the wheel struck it, and this gave way, because I saw evidences of a mark there; and if the railroad were to bring in the old rail, it would show for itself—the one towards Macon, right at the joint though; but I will say that, for a short distance, I would say probably the distance of a coach, it had the evidences of where it had run across the cross-ties; and my theory was that the wheel struck that and ran off—one of the front wheels—

and threw the balance of the coach off before the balance of the wheels got to it, and my opinion of the cause of it is the broken bar. I don't know of any other reason.' Objected to as matter of opinion.

"7. Because the court permitted Rees, a witness for the plaintiff, in rebuttal, to testify as follows: 'I did examine the track where the run-off occurred, and I was on the train at the time of the run-off, and my opinion is that the car running so fast, and that fish-bar being broken at that point, the track gave way and spread, and that caused this run-off.' Objected to as matter of opinion."

W. S. WALLACE, PEABODY & BRANNON, for plaintiff in error.

WM. A. LITTLE, W. T. GARY, for defendant.

Brown, J. — This was an action brought in Muscogee Superior Court by Nancy E. Senn, against the Central Railroad and Banking Company, as lessees of the Southwestern Railroad, to recover damages sustained by the plaintiff by reason of the car, on which she was a passenger, being thrown from the track. It was alleged by the plaintiff that the injury was caused by the negligence and carelessness of the defendant in the construction of its track, and running of its cars at an unusual and dangerous speed. She claimed that, by reason of wounds, bruises and other injuries which she received, that she suffered great physical pain; that she paid out large sums of money for physicians' bills and other expenses; that she was disfigured by a scar on her face. She also claimed to have been damaged by the loss of business, and inability to labor and attend to business, and that her injuries are of a permanent nature.

On the trial of the case, the defendant admitted that the Central Railroad and Banking Company were lessees of the Southwestern Railroad, and were in possession and operating the same as common carriers for hire at the time the injuries were sustained.

The defendant denied that there was negligence or carelessness in the construction of the track or running of the cars, and insisted that the track was well constructed, and that they were running at a safe rate of speed at the time the accident occurred.

The jury found a verdict for the plaintiff for \$10,000, and the defendant moved for a new trial on eleven different grounds, which motion the court below overruled, and refused a new trial, and that ruling is assigned as error, and the case brought by bill of exceptions to this court for review.

In the view we take of this case, it will not be necessary for us to notice specifically all the alleged grounds of error as set out in the

motion for a new trial. We will therefore content ourselves by referring to such of them as we think control the case made by the record.

1. The first and second grounds in the motion will be considered together. The first ground is as follows: Because the plaintiff, being introduced as a witness in her own behalf, was asked by her counsel, in the direct examination, the following question, to-wit (the witness having first given the reasons upon which her opinion was based, as set forth in the brief of testimony): "What did you consider your business worth to you per year at the time you were injured?" To which question the defendant, by its counsel, objected, upon the ground that this was not a proper rule to estimate the amount of damages sustained, and the court overruled the objection and allowed the witness to testify, and she did testify in answer thereto, "I made \$1,500, after keeping up my expenses."

The second ground in the motion for a new trial is in the following words: Because, whilst the plaintiff was a witness in her own behalf, she was asked by her counsel upon the direct examination (the witness having first stated the reasons upon which her opinion was based, as set forth in the brief of evidence): "How much, in your opinion, a year is your loss by your inability to labor?" And the defendant by its counsel objected thereto, upon the ground that the same was a mere guess and conclusion of the witness, and the court overruled the objection and allowed the witness to testify, and she did testify in answer thereto, "Well, I had \$1,500 clear the year that I was hurt. I have just kept even since. I would say my loss is \$1,500."

In cases of this character, the rule is well settled, both in our standard works on evidence and by adjudicated cases, that witnesses, whether parties to the case or not, cannot give their opinions as to the amount of damages the plaintiff has sustained. They must state facts, and not mere opinions, and the jury must be left free to make up their own opinions of the damages from the facts testified to by the witnesses. 9 Meeson & Welsby, 710; 1 Sedgwick on Damages, 553; 47 Ga. 546; 18 Wisconsin, 74. The plaintiff may prove all the facts and circumstances which would shed light upon the question and enable the jury to arrive at the true amount of damages actually sustained. In this case, she might show the character of her business, her ability to labor and attend to business at the time of the injury, how she was injured, and what has been her ability to labor and transact business since the injury, and every other fact which would show that she was damaged in her business by reason of her inability to labor; and the jury, with all the facts before them, should

make up their own opinion from the facts as to the amount of the damages.

In this case, the plaintiff seems to have made up the opinion which she was allowed to give from the fact that she made \$1,500 the year she was hurt, and since that time she has only made expenses. This, at best, would be a very uncertain mode of arriving at the damages. There are so many other causes which might increase or diminish the profits in a business such as that in which she was engaged, that it would be difficult to tell how much her injuries, and how much other causes contributed to her losses. Much might depend upon the number of trains that stopped at her house for meals, the amount of travel and of competition, the price of provisions and a hundred other causes. It often happens that a merchant or boarding-house keeper makes a large amount of money some years, and other years runs the same kind of business with as much ability to labor, and makes nothing. Be this as it may, however, we think she ought not to have been allowed to give her opinion as to the amount of her damages; it matters not upon what facts she based her opinion.

2, 3. We see no error in the ruling of the court upon the third, fourth, fifth, sixth and seventh grounds of the motion. The witnesses were allowed, over the objection of counsel for plaintiff in error, to give their opinions as to what caused the cars to run off the track, by stating the facts upon which they based their opinions.

We think this ruling in accordance with a well-established rule of evidence, and that it was not error for the court to permit these witnesses, who were present, and felt the motion of the train, or examined the wreck and saw the surroundings, the condition of the track and of the fish-bars, the number of spikes by which they were held, the marks on the rails, or other facts from which they could form an opinion as to the cause of the run-off, to state such opinions, provided they stated the reasons on which they were based. An expert may give his opinion without stating the reasons therefore, but one who is not an expert may give his opinion, accompanied with the reasons. It is a very general rule that, wherever an expert can give an opinion without the reasons, that one who is not an expert can give an opinion with the reasons.

The objection to such evidence goes to its weight, and not to its admissibility. The credibility of all evidence depends, not only upon the character of the witnesses for truth, honesty and integrity, but also upon the knowledge the witness has of the facts and subject-matter about which he testifies; and this is more especially true where witnesses are allowed to give their opinions upon any subject.

If it appears that a witness knows but little of the matter about which he testifies, and that from such want of knowledge he is unable to support his opinion by good reasons, the opinion of such a witness would and ought to have but little weight with the jury; while if he showed that he was very familiar with the subject and supported his opinion by strong reasons, the jury would give the opinion of such a witness more weight. But in either case it goes to the weight of the evidence, and not to its admissibility. We do not mean to say that a witness could give an opinion upon mere hearsay; he must know the facts which he states as reasons for his opinion. An expert may give an opinion upon a state testified to by other witnesses.

4. The eighth ground of the motion for a new trial is as follows: Because the court charged the jury in the following language: "In some torts, the entire injury is to the peace, happiness and feelings of the plaintiff. In such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors."

We think this charge given, so far as the record shows, without qualification, was not applicable to the facts of the case, and was therefore error. Section 3067 of our Code, from which this charge was taken, or at least the law embraced in said section, was probably intended to apply to cases where one party injured another from motives of malice, and the injury was of such a character that the damage resulting therefrom could not be estimated by any other rule; as, for instance, where one man spat in the face of another, and other injuries of like character. But since this court has held that, in a case like the one at bar, the plaintiff may recover, not only the actual damage sustained by reason of expenses incurred and by loss of business and ability to labor, but that he may also recover damages for the physical pain and suffering which he endured.

The charge, as given in this case, would seem to be applicable to that part of the damage which plaintiff may have sustained by reason of the physical pain which she suffered.

The charge as given was calculated to mislead the jury, and induce them to believe that the whole case was thrown open to them, and that they had the right to fix the damages according to their enlightened consciences, without regard to the actual damages which were shown by the evidence.

The court should, at least, have qualified this charge by instructing the jury that, so far as the expenses incurred by plaintiff for medical attention and other expenses of like character were concerned, and so far as she was damaged by loss of time, inability to labor and to attend to business, if they found for the plaintiff, they

should find the actual damage sustained by her, as shown by the evidence, and that they might add to that such sum as damage for the physical pain suffered by the plaintiff, and other injuries of that character, where the actual damage cannot be ascertained by any rule of evidence, as in their enlightened conscience they might think reasonable and just.

5. It was insisted before the court in the argument of this case, that if the entire charge had been sent up, it would have shown that the portion of the charge excepted to by the plaintiff in error was qualified, so as to meet and obviate the objection made to the part which appears in the bill of exceptions, and that may be true; but where a portion of the charge is excepted to, and there is nothing in the record or in the presiding judge's certificate to show that the charge which appears was qualified, this court will presume that there was no such qualification.

As this case goes back for a new trial, we express no opinion upon its merits or upon the amount of damage plaintiff is entitled to recover, if entitled to recover at all. Let the judgment of the court below be reversed and a new trial granted.

Judgment reversed.

NEGRO SLAVE INJURED ON TRAIN—PASSENGERS.
—In **MITCHELL v. WESTERN & ATLANTIC RAILROAD**, 30 Ga. 22 (1860), an action to recover damages for injuries to plaintiff's slave while on defendant's train, a verdict was directed for defendant. On appeal judgment was reversed. The syllabus states the case and points as follows:

"A railroad company is liable for such damages from its mismanagement, neglect, or the want of due care and attention. And it is necessary for the plaintiff to show some act that will cast the burden of proof on such railroad company. The fact that a negro is run over and injured, while being transported by the road as a passenger, is not sufficient for that purpose.

"The liability of a railroad for injuries to slaves in their transportation, is to be measured by the law applicable to passengers, rather than by that applicable to the carriage of common goods.

"Less care and caution is necessary by the employees of a railroad, when stopping for wood and water only, than when stopping to take on or put off passengers.

"It is no error in the court to refuse to charge a principle of law, however sound, unless such principle has some application to the cases on trial.

"The fact that the superintendent of the road is on the train, and in the same car where the negro injured was seated, is not even a circumstance to charge the road for injuries received by the negro at that time.

"If the train stop at a wood and water station, and start again in an unusual short time, or with unusual speed, or without blowing the signal whistle at all, or sufficiently long before starting to put persons on their guard, and an injury happens at the time to a slave passenger, any one of these facts will be sufficient evidence of neglect or mismanagement, to charge the road for all damages received at the time by such negro."

HARDWICK v. THE GEORGIA RAILROAD AND BANKING COMPANY.

Supreme Court, Georgia, March Term, 1890.

[Reported in 85 Ga. 507.]

STANDING AT DOOR NEAR PLATFORM OF CAR—SUDDEN STOP OF TRAIN—NONSUIT.—In an action to recover damages for injuries sustained by a passenger standing at the door of the car near the platform, due to alleged sudden stopping of the train, it was held that the declaration showing on its face that the injury was not caused by negligence, but was purely accidental, there was no error in sustaining the demurrer and dismissing the action.

FROM Newton Superior Court. *Judgment affirmed.*

Hardwick sued the railroad company for damages. The material allegations of the declaration were as follows: On February 5, 1888, plaintiff, in company with his minor son, who was under his employment, control and oversight, boarded defendant's night passenger train at Madison station, having tickets purchased from defendant. The conductor collected plaintiff's fare to Conyers station and the fare of his son to Almand station; his son at the same time telling the conductor to stop the train at Almand, where he wanted to get off. But the train ran past that station at the usual speed, fifteen to twenty miles per hour, making no effort to stop, though this was a usual place to take on and discharge passengers. Not wishing to be carried by in this manner, especially as it was dark, plaintiff's son arose and went forward on the train in search of the conductor, in order that the train might be stopped for him to get off. About this time the conductor approached and passed plaintiff from behind, going through the rear door of the coach and leaving it open. As he passed, plaintiff asked him why he did not stop the train to let young Hardwick get off as he had been directed to do. Receiving no reply and the door being open, plaintiff arose and went to the door, naturally feeling great anxiety for the safety of his son under the circumstances. Just as he reached the door, the conductor,

without any notification whatever, seized a rope and gave it a strong jerk, causing the train to come to a sudden and violent stop. Plaintiff naturally threw his left hand against the facing of the door for support and to keep from falling, and a part of his left forefinger was caught between the door and the facing, and a portion of it was thus entirely cut off. The train was not stopped until it had passed the station about four hundred yards above where plaintiff's son got off. The defendant was negligent in not stopping the train at the proper place and in making no effort to do so, and in stopping so suddenly and recklessly at the place where it did stop; and in not propping or fastening the door back so that it would not shut while passengers were alighting; and in not replying to plaintiff's question asked of the conductor. On account of this negligence and without fault on the part of plaintiff or his son, plaintiff has been seriously wounded and maimed for life, from which he suffered intense pain, was put to expense for doctor's bills, etc., and has been permanently injured.

On general demurrer the action was dismissed, and the plaintiff excepted.

E. F. EDWARDS and L. L. MIDDLEBROOK, for plaintiff.

J. B. CUMMING and J. M. PACE, for defendant.

Bleekley, Ch. J. — The substance of the declaration is set out in the official report. We concur with the court below in thinking that it sets forth no cause of action. The failure of the company to stop the train at the station was, it is true, negligence and a violation of duty; but that and the plaintiff's injury were not related to each other as cause and effect. Leaving the door of the car open whilst the train was in motion was not negligence. For, as matter of general information, it is known to all travellers that the doors of passenger cars can be left open temporarily, without exposing passengers to unusual danger. Nor was it negligence for the conductor to stop the train suddenly, in order to repair as speedily as possible the error he had committed in passing the station without stopping. Although the plaintiff's injury resulted from the stopping of the train and the fact that the door was open, yet it seems to have been a pure accident; for no such thing would have happened if the plaintiff had not chanced at the moment to be standing near the door, instead of occupying one of the seats in the car. His exposed position was not known to the conductor, or at least it is not alleged to have been known. Taking the declaration as true, the injury was an accident, and courts, in the present state of the law, must recognize accidents as such, even when they occur upon railroads.

Judgment affirmed.

COTCHETT V. THE SAVANNAH AND TYBEE RAILWAY COMPANY.

Supreme Court, Georgia, March Term, 1890.

[Reported in 84 Ga. 687.]

PASSENGER INJURED WHILE PASSING FROM ONE CAR TO ANOTHER.—Whether, under the facts of this case, the plaintiff, a passenger on the defendant's train, who was injured while passing from one coach to another by their sudden separation, throwing him to the ground was in the exercise of ordinary care, should have been submitted to the jury; and the grant of a nonsuit was erroneous (1).

FROM City Court of Savannah, before Judge Harden, February Term 1889. *Judgment of nonsuit reversed.*

Cotchett sued for damages for personal injuries. His evidence tended to show the following: On the night of August 17, 1887, he was a passenger on defendant's excursion train of eight or nine comfortably full cars. A large number of people were aboard, but all could be provided with a seat. Plaintiff was sitting in one of the cars, and when the train was going very slowly and about to stop, he got up to get some water; there was none in the car where he was sitting, and he started into the next car to get some. He passed through the door to the platform of the next car, where one Hodges was standing and a few words were exchanged between the two. At the close of the conversation, lasting about a minute, plaintiff, in the act

1. In **GARDNER v. WAYCROSS AND LUMBER R. R. Co.**, 97 Ga. 482 (1895), it was held that "Where a passenger on a train standing upon a track at a station whence it was to be started went into the baggage car for the purpose of seeing the conductor upon legitimate business connected with the passenger's journey, and while there was thrown down and injured by the sudden bumping of another car against the standing car, whether or not, in view of all the evidence submitted, the passenger was rightfully in the baggage car, and whether or not the injury resulted from the negligence of the company, and whether or not

such injury might have been avoided by the exercise of ordinary diligence on the part of the passenger, were all questions for determination by the jury and not for final solution by the trial judge. It was, accordingly, error, in such a case to grant a nonsuit." See *Cotchett v. Savannah & Tybee Ry. Co.*, 84 Ga. 687, (above reported).

The declaration in the *Gardner* case is set out in 94 Ga. 538, where the same was held to state a cause of action, and judgment below dismissing action was reversed. The plaintiff was subsequently nonsuited, to which he excepted. The ruling is stated in the preceding paragraph.

of going away from Hodges, put his right foot in the doorway of the car and raised his left foot, when the car separated, and he was thrown to the ground, and the wheel of the car ran over and crushed his foot. When he fell, he struck the back of his head on the cross-tie, and this knocked him unconscious; otherwise he would have had time to get out of the way. The immediate cause of his falling was the breaking of the link or of the coupling-pin. The car apparently was not in the right place, two lady passengers being about to get off, and it had to jerk; and it required a little more force to get around the curve it was on; and as the engineer pulled open the throttle, it jerked very suddenly and separated. At the time the link or pin broke, neither of plaintiff's feet was on the platform. If the car had separated while he was talking with Hodges, it would have thrown him sideways and he would have had some chance to grab the guard. Since the accident, the car has been provided with chains to hold it in case the link should break; but there were no chains there at the time plaintiff was hurt. He was then perfectly sober; if the pin or link had not broken, he would not have fallen; but the breaking caused the automatic airbrakes to stop the car suddenly, and the jerk thus caused threw him out. He did not recollect that there was any sign or notice on the door requesting the passengers not to stand on the platform, although there may have been one, as there generally is on passenger coaches. He did not see the conductor until after he was hurt, and made no request of any one in the train to furnish him with water, but endeavored to find it for himself. People were continually passing from car to car, and a witness heard the conductor telling the people to get off the platform, but plaintiff was not present, and the witness did not know that plaintiff heard him. The coupling-pins were small. The other evidence, as to the extent of the injury, etc., is not here material.

The court granted a nonsuit on the ground that the evidence showed that the plaintiff was not in the observance of ordinary care, holding that but for this view as to plaintiff's fault, the case would be for the jury. The plaintiff excepted.

DENMARK & ADAMS, for plaintiff.

J. R. SAUSSY, for defendant.

Blandford, J. — In this case the court awarded a nonsuit. The plaintiff excepted, and says that this was error. We are of the opinion that the court committed error in awarding a nonsuit in this case; that the same should have been submitted to a jury.

Judgment reversed.

BALL (RECEIVER) V. MABRY.*Supreme Court, Georgia, March Term, 1893.*

[Reported in 91 Ga. 781.]

RECEIVERS—ACTION.—As receivers of railroads operating the same under legal authority exercise the charter franchises of the company, they are subject to suit in any county in which the railroad corporation itself may be sued for a like cause of action. While their personal residence is unaffected, their official residence coincides with that of the company they represent, the action being brought to enforce official and not personal liability. In order to sue a receiver appointed by a court of the United States, no permission of that court is requisite, there being an Act of Congress dispensing therewith.

DUTY OF CARRIER—INSTRUCTION.—The degree of diligence due from a common carrier to a passenger is extraordinary, no matter what means of conveyance may be employed; but what is extraordinary diligence by a freight train is different in many respects from that which is such diligence by a passenger train. In this case the jury would so understand from the charge of the court.

DAMAGES—FUTURE PAIN.—In a proper case it is not error to charge that the plaintiff is entitled to recover for the pain and suffering he will probably endure in the future.

RIDING ON FREIGHT TRAIN—JOLT OF CAR—EVIDENCE.—A passenger by a freight train takes the risk of the usual and ordinary jolts properly incident to handling and running such trains; and when the nature and degree of the jolt complained of are material, a witness who was present and had experience in such matters on the same railway should be allowed to testify in behalf of the company that the car was not going faster than usual, that the jolt was not more than ordinary, and the shock was not sufficient to throw a man unless he was standing. This evidence would serve to communicate to the jury in appropriate language some idea of the nature and violence of the jolt by which the plaintiff was injured.

FROM Polk Superior Court. *Judgment reversed.* The facts appear in the opinion.

A. T. LOUDON, IVY F. THOMPSON and J. P. RAMSAUR, for plaintiff in error.

IRWIN & BUNN and BROYLES & SON, for defendant in error

Simmons, J.—1. Mabry brought an action for damages in the Superior Court of Polk county against Ball, as receiver of the East and West Railroad of Alabama under appointment of the Circuit Court of the United States, alleging that he was injured by the negligence of the defendant's agents and servants while a passenger on a

train on that road. Ball filed a plea in which he alleged that "he is now, and was at the time of the bringing of this action, a resident of Cartersville in the county of Bartow in the State of Georgia, and is not now, nor has he ever been, a resident of said county of Polk." On demurrer this plea was stricken. The receiver of a railroad who operates the same under legal authority is not liable personally for his official acts. His official liability relates to the fund or property which the court is administering by the machinery of receivership. The receiver does not operate the railroad as an individual, but exercises the charter rights and franchises of the company of which he is receiver. As receiver he resides in each county through which the railroad passes. Exercising the franchises of the company, he becomes a common carrier and stands in the shoes of the company, and is liable to be sued in the county where the cause of action originated, as the company would have been, under section 3406 of the Code, before he was placed in charge as receiver. Nor is it necessary, where a receiver has been appointed by a court of the United States, to obtain permission of that court before bringing the suit. The Act of Congress of March 3, 1887, 24 U. S. St., p. 554, dispenses with the necessity of obtaining that permission from the court. See 40 Fed. Rep. 426; 49 Fed. Rep. 807.

2. Whenever a common carrier undertakes to carry passengers for hire, he is bound to extraordinary diligence, no matter what means of conveyance may be employed to carry the passenger. This standard of diligence applies as well where the passenger is carried upon a freight train as it does where he is carried upon a passenger train. But what may amount to extraordinary diligence with respect to one class of trains may not amount to it with respect to another class. The standard of diligence is the same, but the manner of its exercise must depend upon the circumstances of the case, taking into consideration the character of the train and the manner in which it is usually made up and run, and in which the cars are usually coupled to one another. It is well known that jolts and jars are usual and necessary in the running of a freight train, much more so than in the running of passenger trains; and a passenger who voluntarily takes passage on a freight train takes the risk of the usual and necessary jolts and jars which happen in the making up and running of such trains. A jolt or jar which would be unusual and unnecessary in a passenger train, might be usual and necessary in a freight train. But where a common carrier takes a passenger on a freight train, he must use extraordinary care in preventing unusual

and unnecessary jolts and jars, so as to protect the passenger, just as he is required to do to prevent any jolts and jars on a passenger train which would be likely to injure the passenger. See *Crine v. R'y Co.*, 84 Ga. 651; *Chattanooga, Rome, etc., R. Co. v. Higgins*, 89 Ga. 495 [5].

3. Where a passenger on a railroad has been injured by the negligence of the company's servants, he is entitled to recover for the pain and suffering caused by the injury, and it is not error for the court to so instruct the jury.

4. The injury on account of which this action is brought was alleged to have been caused by the negligence of the defendant's agents and servants in allowing the freight cars to run together so rapidly as to produce an unusual and unnecessary jolt, which threw plaintiff down from his seat and injured him. The defendant offered to prove by a witness who was present, and who had had experience in such matters on the same railroad, "that the car was not going faster than usual, the jolt was not more than ordinary, and the shock was not sufficient to throw a man unless he was standing." On objection of plaintiff's counsel to this evidence, the court excluded it. We think this was error. As before remarked, a passenger on a freight train takes the risk of the usual and ordinary jolts incident to handling and running such trains. If he is injured by reason of such jolts, the nature and degree of the jolt complained of are material. It is material for the plaintiff to show that it is unusual and unnecessary; it is material for the defendant to show that it was a usual and necessary jolt. There is no machine or instrument by which the violence of the concussion may be determined. It can only be determined by its effect upon the cars and the passengers, and by the opinion of witnesses who have had long experience and training in the management of trains of this character, and who have seen or felt the jolt or jar in question, and who are thus qualified to give an opinion as to whether it was unusual, or usual and ordinary. We think the evidence offered would serve to communicate to the jury some idea of the nature and violence of the jolt by which the plaintiff was injured.

Judgment reversed.

STANDING ON SEAT IN CAR OF TRAIN—SUDDEN START OF TRAIN—PASSENGER INJURED.—In an action to recover damages for injuries sustained by being thrown down in a car it appeared from the evidence that plaintiff was a passenger upon one of defendant's trains; that she had in her possession as part of

her personal belongings two or three small bundles; and that when she entered the train, finding that the receptacles fastened to the side of the car above the seats, for holding packages and bundles of passengers, were beyond her reach, she stood upon a seat and placed her bundles in the receptacle herself. No servant of the company saw her do this, nor did she ask any assistance in so doing. When she reached a point on her journey where it was necessary to change cars, she arose, stood upon the seat and attempted to take down her bundles, and while in this position the cars suddenly moved and she was thrown from the seat on which she was standing to the floor and injured. It appeared that the train safely reached its destination, stopped at the usual place for passengers leaving the cars, remained there long enough for all of the passengers to alight, saving the plaintiff, and then moved down a few steps where it stopped again. It did not appear that plaintiff called the attention of any servant of the defendant to the situation of her bundles, or requested any assistance from them in her efforts to remove them from the place where she had deposited them. The servants of the defendant were outside the car assisting the passengers who were alighting. None of them saw her attempt to get upon the seat. On the trial in the Whitfield Superior Court, plaintiff had a verdict and judgment. On appeal the Supreme Court (*per ATKINSON, J.*) held that the facts of the case did not authorize a recovery. The plaintiff was in a perfectly safe situation. The company had provided her with a means of transportation which afforded every possible immunity against injury as long as she enjoyed it in the manner usual to passengers and in the manner designed by the company. Defendant's agents could not anticipate that at the time when this passenger was supposed either to have left the car or to have been seated within it, she would be standing in a dangerous position upon one of the seats in the car. Plaintiff's injury could not be attributed to defendant's negligence. Judgment reversed. *McCutchen & Shumate, appeared for plaintiff in error; R. J. & J. McCamy and O. N. Starr, for defendant in error. Supreme Court, Georgia, April, 1895. East Tennessee, Virginia & Georgia R. R. Co. v. Green, 95 Ga. 736.*

FRINK ET AL. V. POTTER.

Supreme Court, Illinois, June Term, 1855.

[Reported in 17 IN. 406.]

STAGE COACH UPSET—DRIVER—WITNESS.—The driver of a stage coach, in an action against the proprietor by a passenger for injuries sustained by upsetting of the coach, may testify as to its condition at the time of the accident.

DEFECTIVE WHEEL—LIABILITY.—A stage proprietor will be liable for injuries to a passenger, although it should appear that the injuries resulted from the breaking of an axle from the effect of frost.

CARRIERS OF PASSENGERS.—Carriers of passengers are held to strict care and vigilance, and are liable for the consequences of slight neglect or want of care. The law imposes upon them the duty of carrying passengers safely, so far as by human agency, in view of the particular mode adopted and all attending circumstances, is reasonably practicable.

LIABILITY.—If the carrier knew or might have known by the exercise of extraordinary care and attention, that danger would result from using a coach, in the manner and under the circumstances to which it was applied, and this danger could have been avoided, he will be liable.

PASSENGER LEAPING FROM STAGE COACH.—A passenger in or upon a stage coach may leap from it, to extricate himself from peril, occasioned by the fault of the carrier, if he does so without rashness.

PLEADING AND PRACTICE.—In an action on the case for injuries against several, as stage proprietors, the plaintiff need not prove that all the defendants were joint owners of the stage line.

SAME.—The rules applying to actions *ex delicto* determine the rights of parties, where the gist of the action is a breach of duty not depending upon a contract, and the allegations show that the law raises the duty by reason of the calling of the defendant.

CARRIERS NOT INSURERS.—Common carriers of passengers are not insurers against all injury or damage, nor does the law require of them unreasonable or impracticable vigilance.

APPEAL from Lasalle. *Judgment reversed.*

The declaration contains four counts substantially alike, in each of which appellee alleged that appellants were proprietors of a coach, and running the same from Peoria to Springfield in December, 1852, and that, at the instance and request of appellants, appellee became and was a passenger in said coach, to be carried from Peoria to Springfield for hire, and that, on the route, for want of proper care on the part of appellants, the coach was overturned, and thereby plaintiff was hurt. To this declaration appellants pleaded not guilty.

The cause was tried by HOLLISTER, J., and a jury at the November Term, 1854, of the Lasalle Court, and a verdict and judgment against the appellants for \$3,604.50 damages.

T. L. DICKEY and W. L. WALLACE, for appellants.

E. S. LELAND and B. C. COOK, for appellee.

SKINNER, J.—This was an action on the case, against Frink, Sanger, Walker and Parmerly, as common carriers of passengers by stage, for an injury to the plaintiff while a passenger in one of the defendant's coaches. The declaration, in various ways, alleges that for want of proper care on the part of the defendants, the coach in which the plaintiff was passenger broke and overturned whereby the

plaintiff was hurt and wounded. Verdict and judgment for the plaintiff against all of the defendants.

On the trial the plaintiff offered to read in evidence the deposition of a witness taken in Michigan. The defendants produced the witness in court, and objected to the reading of the deposition, for the reason that the witness was in court; and the court overruled the objection. The deposition having been taken in conformity with the law, was admissible in evidence, and the plaintiff could not be deprived using it by the act of the defendants. They had an opportunity of cross-examining the witness when the deposition was taken. If they chose they could have called the witness as their own witness, and examined him generally, as well as touching the matters to which he had testified in his deposition. Beyond this they could not go. *Bradley v. Geiselman*, decided at the present term of this court [17 Ill. 572]; *Phoenix v. Baldwin*, 14 Wend. 62.

The defendants objected to the eighth interrogatory of this deposition, and to the answer thereto. There is no merit in the objection. The witness was the driver employed by the defendants, and he is asked what was the condition of the coach, whether it was safe and in good condition, and if not, what were its defects? He answers that it was bad, old, out of repair, unfit to run, and refers to his answer to the sixth interrogatory for statement of the particular defects. There is nothing asked or answered, about which men of ordinary knowledge and experience would not be competent to judge with greater or less accuracy; nor is any question of science or skill raised, requiring the interposition of an expert for solution. *Ward v. Salisbury*, 12 Ill. 370. But, if it were otherwise, the defendants' employee in the business of stage driving, as against them, would be presumed to possess the requisite skill to judge of the condition of the stage coach, and of its fitness for use. The objection to proof by plaintiff, that it was customary on the line for passengers to ride on the outside of coaches, is equally meritless.

The court refused the following six instructions asked for by defendants:

"If the jury believe from the evidence that the cause of the accident which occasioned the plaintiff's injury was the breaking of the axletree of the defendant's coach from frost, and not from any defect in the axletree, then they should find for the defendants."

"If the jury believe from the evidence that the cause of the accident which occasioned the plaintiff's injury was the breaking of the axletree of the coach from frost, and not from any defect in the coach,

or in the axletree, then whether the coach was old and defective or not, they should find for the defendants."

"If the jury believe from the evidence that it is equally as probable that the axletree broke from the effect of the frost as from any defect in the coach or in the axletree, then the jury should find for the defendants."

"If the jury believe from the evidence that the plaintiff's injury resulted from sliding, or jumping, from the outside of the coach, before the same upset, and not from the upsetting of the coach, then the jury should find for the defendants."

"Whether the plaintiff would be justified, or not, in jumping or sliding from the coach, in order to avoid a greater apprehended peril that might result to him from awaiting the upsetting of the coach, yet, inasmuch as that state of facts is not alleged in the declaration, the plaintiff cannot recover, even although the above state of facts may be true."

"Unless the jury believe from the evidence that all the defendants, Frink, Sanger, Walker and Parmerly, were joint owners of the coach in which the plaintiff was a passenger at the time of the accident, they cannot find for the plaintiff."

The court instructed the jury, on the part of the plaintiff, that, "If the coach might have been constructed in a manner that would have obviated all danger from frost, and still have been suitable for the business of carrying passengers; or if the defendants, by housing or taking the utmost care of the coach, when it was running, could have prevented the action of the frost, then, even if the axletree did break from frost, that would not constitute a defense."

The first, second and third of these instructions suppose the law to be, that if the injury arose from the breaking of the axle, and that frost was the cause of the axle breaking, the defendants are without fault, and, therefore, not liable. It does not follow that, because the axle broke from frost, the defendants were not in fault. It is the duty of common carriers of passengers to do all that human care, vigilance and foresight can, under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably, to guard against and prevent accidents, and consequent injury to passengers. They are held to strict care and vigilance in providing and operating their respective modes of conveyance, and are liable for the consequences of slight neglect or want of care. The law imposes upon them a duty safely to carry those who take passage with them, so far as by human agency, in view of the particular mode adopted,

and all attending circumstances, is reasonably practicable. 2 Kent's Com. 600; Angell on Carriers, chapter 11; Stokes v. Saltonstall, 13 Pet. 181 (1); McKinney v. Neil, 1 McLean, 540 (2); Maury v. Talmadge, 2 McLean, 157.

Frost may have been the immediate cause of the accident, and yet the accident might have been avoided by the exercise of that care and vigilance incumbent upon the defendants. If, for instance, the axle was composed of material peculiarly subject to the action of frost, and the coach was used at a time, in a manner, or under circumstances likely to produce a breaking of the axle, and without resort to such preventive measures as were practicable, and reasonably accessible; or, if the cold was severe, and the coach had been unnecessarily exposed to the action of the frost and such exposure increased the danger arising from such cause; or, if the defendants knew, or might have known, by the exercise of extraordinary care and attention, the danger of using the coach in the manner and under the circumstances used, and this danger could have been, by strict vigilance, avoided, the defendants would, upon the principle stated, be in fault, and liable. All the facts being admitted supposed by these instructions, yet the defendants may not have been without fault.

The fourth and fifth of these instructions assume, that under the allegations of the declaration the plaintiff cannot recover, if, before the actual overturning of the coach, by sliding or jumping therefrom, although to avoid a greater apparent peril, the plaintiff received the injury. The declaration alleges that the fore axle of the coach broke down, and the coach overturned while running, and that thereby the plaintiff was hurt and wounded. The evidence shows that the plaintiff was riding on the outside of the coach with the driver; that the axle broke in the center, letting the coach down and upsetting it; that the plaintiff, at the time of the accident, or before the coach upset, jumped or slid from his seat to the ground; and that the passengers inside the coach were not injured. It is wholly immaterial whether the plaintiff was injured by the upsetting of the coach, or whether the axle having broke and the plaintiff thereby having been put in actual peril, to avoid injury, in the exercise of ordinary discretion, jumped to the ground, and in so jumping received the injury. Passengers have a right, the best they may, to extricate

1. Stokes v. Saltonstall, 13 Pet. 181, is reported in 7 Am. Neg. Cas. 297.

2. McKinney v. Neil, 1 McLean, 540, is reported in 7 Am. Neg. Cas. 612.

themselves from peril, the fault of the carrier; and if in obeying the dictates of their nature, and without such rashness as the circumstances would not reasonably excuse, they meet an unlooked for injury, the carrier is still liable, for the injury is the result of his wrong. The breaking of the axle, in this case, was the direct and proximate cause of the injury, and a part of the accident out of which it arose. The fact that the plaintiff was riding on the seat with the driver, makes no difference. It is not pretended that the conduct of the plaintiff produced, or contributed to produce, the accident, of which the injury was the consequence; and unless it did, it is not a case of injury resulting from the plaintiff's wrongful act, or the concurring wrong of both parties.

He was so riding by the permission of the defendants, and although the danger of injury in case of accident was thereby increased, this would not exonerate the defendants from liability for their negligence. *McKinney v. Neil*, 1 McLean, 540; *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189.

The sixth of these instructions assumes, that to maintain the action, the plaintiff must prove that all the defendants were joint owners of the stage line. This is not the law. The declaration is founded upon the common law regulating common carriers; and this law imposes a duty upon them by reason of their calling, from considerations of public policy, and without regard to contract. It is true, that the law presumes or implies from the fact of receiving, as common carriers, the passenger to carry for hire, a contract. But the plaintiff had his election to sue in *assumpsit*, declaring upon the contract, express or implied, or in case, for tort, declaring upon the breach of duty imposed by the law. He chose the latter, and was not compelled to maintain his action, to prove all guilty, or the alleged relation of all the defendants to each other.

If the defendants were joint owners of the stage line, and the accident and injury arose from the fault of either of them or their servants, each and all were guilty. If but a portion of them were proprietors of the line, then such proprietors, and each of them, were guilty, if the accident and injury arose from the fault of any of them or of their servants. It is urged that, as the declaration alleges, that all of the defendants were joint proprietors; unless this be proved, the *allegata* and *probata* do not correspond, and the plaintiff must therefore fail. This would be true were the contract declared on, or were it the substance of the cause of action; but it is not true when the action is in form *ex delicto*, and founded solely on a breach of the com-

mon law duty of common carriers. In case, generally, the plaintiff may recover against so many as he proves guilty of the alleged wrong, although he may have alleged the wrong to have been committed jointly by all of them, if, indeed, in contemplation of law the wrong can jointly be committed. There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty, for the breach of which duty an action on the case may be maintained; and in such cases the contract being the basis and gravamen of the suit, must be alleged and proved. Where, too, from the facts the duty arises, and there is also a contract which is alleged and made the substance and gist of the cause of action, although the action be case, it being substantially founded upon contract, the rights of the parties will be governed by the law of contract.

But when the gist of the action is a breach of duty and not of contract, and the contract is not alleged as the cause of action, and when, from the facts alleged, the law raises the duty by reason of the calling of the defendant—as in case of innkeepers and common carriers—and the breach of duty is solely counted upon, the rules applying to actions *ex delicto* determine the rights of the parties. 1 Chitty's Pl., 87, 88; Wright v. Gear, 6 Vt. 151; Bank of Orange v. Brown, 3 Wend. 158; 6 Watts, 47; Bretherton v. Wood, 3 Brod. and Bing. 54 (1); McCall v. Forsyth, 4 Watts and Serg. 179; 19 Wend. 534; Angell on Carriers, secs. 422 to 429.

The instruction given by the court for the plaintiff was doubtless intended as a qualification of instructions given for the defendants, but in any light was calculated to mislead the jury, and if held to be

1. In BRETHERTON v. WOOD, 3 B. & B. 54, which was an action against ten, the plaintiff declared, that they were proprietors of a stage coach, for the conveyance of passengers for hire from A to B; and that, being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from A to B, for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskillfulness, and

default of themselves and their servants, the coach was upset, by means whereof the plaintiff was hurt, and sustained other injuries: a jury having found a verdict against eight only, and in favor of the other two, and judgment being entered accordingly:—Held, that as the action was founded on a breach of duty, imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber.

the law, would extend the liability of common carriers of passengers to a most unreasonable point. Common carriers of passengers are not insurers against all injury or damage.

Although the law requires the highest degree of care on the part of the defendants, and holds them liable for slight negligence, it does not require of them unreasonable or impracticable vigilance. The language of the law must be viewed in a practical and common sense light, and so applied in the administration of justice. What is reasonable and practicable under one condition of things, may not be under another. What in one case would be accessible, and facilitate the convenience and safety of travel, in another and under different circumstances might be inaccessible, and destructive of the particular enterprise. The axle might have been constructed of wood or other material than iron, and have been, perhaps, suitable to the business, which frost would not affect, and yet, upon the whole, not have been as safe, or fit for the particular use. The housing of the coach might, from the condition of the country, have been impracticable.

If the same acts of care and precaution practicable in the most populous countries and under the most favorable circumstances were required to fill the measure of the law, under a condition of things entirely different existing in a new country, the effect would be to discourage enterprise of the character in question, and to lessen the facilities for public travel of the people of the newer portions of our country. The law is not designed to work such a result. The true question for inquiry was: Would a person of extraordinary prudence and caution, intending to afford the greatest security to passengers, and at the same time afford reasonable facilities to travel, under all the circumstances have acted differently? It is impossible by the use of language to define negligence in fact, applicable alike to all circumstances and conditions of things; and all that can be done in determining in any given case whether there is or is not negligence, is, in view of all the surrounding facts, the nature of the means employed and the character of the enterprise, by the exercise of the reason to form a judgment as to whether it does or does not exist. *Beers v. Housatonic R. R. Co.*, 19 Conn. 566.

Judgment reversed and cause remanded.

STAGE COACH OVERTURNED—CARRIERS.—In an action for damages for injuries sustained by plaintiff by the overturning of a coach, the declaration stated that defendants, Tuller and others, were owners of a stage coach, for conveying passengers from Terre Haute to Trenton, Illinois, for hire; that plaintiff Rosannah Talbot,

on January 10, 1857, became a passenger, to be safely carried in said coach from Greenup to Terre Haute, for which she paid her fare; that defendants received her as a passenger, to be safely carried; that defendants did not use proper care, but neglected to do so; that while on the way the coach was by the negligence and carelessness of the driver, the servant of the defendants, overturned, whereby plaintiff's collar bone was broken, and she was otherwise bruised and injured and became sick, sore, and lame, and so continued until the commencement of the suit, whereby she suffered pain, was put to expense in the sum of \$200 in endeavoring to be cured and was prevented from prosecuting her journey, and was put to \$200 expense in her support. Damages were laid at \$5,000. Trial by jury; verdict for plaintiff for \$1,050. New trial refused and defendants appealed. On appeal the instructions of the court below were reviewed and sustained. It was held that common carriers of persons are required to do all that human care, vigilance and foresight reasonably can under the circumstances, and in view of the character and mode of conveyance adopted, to guard against accidents and consequential injury. But this rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render its use impracticable. Nor does it require the utmost degree of care the human mind is capable of inventing, but the highest degree of practicable care consistent with the mode of transportation used. It is the duty of stage coach proprietors to furnish competent and careful drivers and where a substitute to a regular driver is employed, the proprietors are liable for his incompetency or carelessness in driving. Judgment for plaintiff affirmed. *S. B. GOOKINS*, appeared for plaintiff in error; *C. H. CONSTABLE* and *O. B. FICKLIN*, for defendants in error. Opinion by *WALKER, J.* *Supreme Court, Illinois, January Term, 1860. Tuller et al. v. Talbot*, 23 Ill. 857.

GALENA AND CHICAGO UNION RAILROAD COMPANY v. YARWOOD⁽¹⁾.

Supreme Court, Illinois, June, 1854.

[Reported in 15 Ill. 468.]

PASSENGER JUMPING FROM DERAILED CAR.—A passenger who was informed that the passenger cars were full, but that he might ride in the baggage car, and he engaged in a playful scuffle with some companions who chased him into a passenger car in which he remained until it was derailed, when he jumped from it and broke his leg and the

1. Cited in *Galena, etc., R. R. Co. v. Fay*, 16 Ill. 558, 9 Am. Neg. Cas. 223. *post.*
215, *post.*; *Peoria & R. I. R. Co. v.*

baggage car in which he took passage remained on the track, cannot recover for the injury (1).

CAUSE heard before J. G. Wilson, Judge, and a jury, at February Term, 1854, of Kane Circuit Court. Verdict and judgment for plaintiff for \$1,000. Motion for new trial overruled. *Judgment reversed.*

COLLINS & WILLIAMS, for appellants.

BLACKWELL & BECKWITH, for appellee.

Scates, J.—The question is: Ought a new trial to be granted to the plaintiffs, on account of the insufficiency of the evidence, and the instructions given and refused in the trial below? The action was brought by defendant for injuries received on account of the carelessness of the plaintiffs and servants, in their business as common carriers of passengers. First, as to the law.

The court gave twenty-one instructions for defendant, to all of which exceptions were taken; but assignment of errors is to 4th to 17th inclusive, and a refusal to give the third of plaintiff's series. The latter is, "that the defendant (plaintiffs here) as a common carrier of passengers, is not an insurer of personal safety against all accidents, but is liable only for the want of such care and diligence as is characteristic of cautious persons; and if the defendant exercised such care and diligence in the transportation of the plaintiff, then the plaintiff cannot recover in this action."

The first part of this instruction would be correct. This is the rule of the American courts. 2 Kent Com., 600; Story on Bailments, sec. 600; Angell on Carriers, secs. 522, 535, 568. In *Ingalls v. Bills*, 9 Metc. 1 (2), the court gave a lengthy examination to the English

1. In *GALENA & CHICAGO UNION R. R. Co. v. YARWOOD*, 17 Ill. 509 (1856), a subsequent appeal on the case at bar, it was held that the preponderance of evidence was not such, on this trial as it was on the former (above reported) as to demand the interposition of the court. On the trial there was a verdict for plaintiff for \$2,500 and judgment rendered accordingly. Defendant appealed on the ground of erroneous instructions on the question of negligence. It was held that a passenger in a railroad car need only show that he has received an injury, to make a *prima facie* case against the carrier; the latter must rebut the presump-

tion, in order to exonerate himself. Negligence is a question of fact, which the jury should pass upon. Persons in positions of great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowances for them and leaves the circumstances of their conduct to the jury. Several of the instructions being contrary to the rulings thus laid down, judgment was reversed. Opinion by **SCATES, CH. J.**

Compare *Galena & Chicago Union R. R. Co. v. Fay*, 16 Ill. 558, case next reported.

2. See this case reported with the *Massachusetts* cases, page 426, *post*.

authorities to show that they are not to be understood as going this length of putting them upon the same liability of common carriers of goods. But, on the other hand, the uniform current of authorities in both England and the United States is uniform as to their liability for slight negligence, and in holding them to the utmost prudence and caution. *Stokes v. Saltonstall*, 13 Pet. 190 (1); *Philadelphia and Reading R. R. Co. v. Derby*, 14 How. U. S. 468; *Ingalls v. Bills*, 9 Met. 1; *Angell on Carriers*, sec. 568; *Christie v. Griggs*, 2 Campb. 79 (2). The latter part of the instruction has adopted, as the true definition of the degree of diligence required, the language of *Savage, Ch. J.*, in his argument in *Camden and Amboy R. R., etc., v. Burke*, 13 Wend. 629. The expression was incidentally used in argument without any intention of defining exactly the degree of diligence; and although quoted by *Angell on Carriers*, sec. 523, yet it is for the purpose of showing the distinction taken in the case, between the carriers of passengers and carriers of goods, as to the degree of liability. It is too narrow, and does not express the full degree of plaintiff's liability as common carriers of passengers. The law is well and fully laid down in *Stokes v. Saltonstall*, 13 Pet. 190, in relation to stage coach proprietors. There is no reason for a distinction as to railroads, but the same degree of diligence has been required in numerous decisions; and no more has been exacted in any I have met with. *Angell on Carriers*, secs. 78, 538, and authorities referred to.

I need not copy the several instructions objected to, which, we think, lay down the law correctly.

The fourth instruction has expressed the rule in relation to the degree of diligence required, stronger than we have met with it in the authorities. They are required to use extraordinary care and diligence, which imposes liability for slight neglect; but this instruction says the "smallest neglect."

We see no particular objection to any of the other instructions, except the 11th and 13th. The others state abstractly correct propositions of law, in connection with particular portions of the evidence.

The 11th and 13th instructions given are: "That the fact that the

1. *Stokes v. Saltonstall*, 13 Pet. 181, 190, is reported in 7 Am. Neg. Cas. 297.

2. In *CHRISTIE v. GRIGGS*, 2 Campb. 79, an action against a proprietor of a stage coach for negligence, whereby the coach broke

down, and the plaintiff, travelling by it as a passenger, was hurt, it was held, to prove negligence, it is *prima facie* enough to give evidence of the coach having broken down; from which negligence will be presumed.

plaintiff jumped from the cars, while they were in motion, to the ground, and thus sustained the injury complained of, will not deprive him of a right to recover against the defendants, if the jury believe, from the evidence, that an accident had occurred; that the cars were off the track, and running at the rate of from three to five miles per hour; and the plaintiff had reasonable grounds to believe, and did believe, that his life or limbs were in danger, and that it was necessary to leap from the cars, in order to avoid the danger which threatened him." "13th. That the fact that the plaintiff was a few minutes previous to the occurrence of the accident and injury, scuffling and playing in a sportive manner, with others on the car, will not deprive the plaintiff of his right to recover, from the defendants, if the jury believe from the evidence, that the defendants, or their agent, were guilty of any neglect, however slight, whereby the accident and injury occurred, unless the jury further believe that such scuffling and playing contributed to produce the injury." It requires great caution and circumspection in courts, when instructions of this character are asked, to avoid injustice to the opposite party. To state a portion only of the material facts connected with a particular transaction, and omit other material ones, which might put a very different phase upon it, and tell the jury if they believe that such facts are proven and true, then the right is with the party, may, and frequently does, lead the jury to regard the facts so stated as the only important facts in that connection. And it not unfrequently happens that very unimportant if not immaterial facts are selected for this purpose. We so regard the facts set forth in the 13th instruction. Few persons would feel authorized, from reading the instruction, to follow up the acts of defendant here, which really constituted his negligence in the matter, and which that "scuffling and playing contributed to produce" instead of the injury; and which acts of his, subsequent, rather caused him the injury.

Some portion of the facts should be considered in connection with these two instructions.

The passenger train, on the day of the injury, consisted of a baggage car next the tender, then a second-class, and lastly a first-class passenger car. The two passenger cars were full, and some left standing. The plaintiff and two others, all young men, offered themselves at Elgin as passengers to Clinton, a few miles distant, and the next station. They were told by the conductor that the passenger cars were full, but they could go in the baggage car. They got into it—in which there were only two or three others, employees on the

train. It was in August, and the weather hot. Soon after the train left Elgin these three passengers, having neither coats, vests, nor suspenders on, commenced playing and scuffling, to pull each other's linen out of their breeches. This continued until one ran out of the baggage car through the passenger cars, and one or both the others after him, which was just before the cars were thrown off the track. When thrown off the track the plaintiff below had quit scuffling. He was in the forward end of the hindmost car, but inside it. When the train reached a portion of the road built with wooden rails, and a ribbon plated with flat bar iron, from some cause, possibly a snake head, a piece of the flat iron plating was torn up by the wheels, and which threw the hind trucks of the second and forward trucks of the first-class cars off the rails. The jumping, jerking, and roughness of the motion, created great excitement and commotion. The whistle caused the brakes to be put on. Defendant rushed out of the forward end of the car, and jumped from the platform, by which his leg was broken. The train ran about thirty feet, or the length of the car, after he jumped. The speed on this part of the road was twelve to fifteen miles an hour. Witnesses gave an opinion that the train was moving at the rate of three to five miles at the time plaintiff and two or three others jumped. Much other evidence was given in relation to the manner of building this road, its condition, and the care and diligence of its police, and repairs. This portion was flat bar; road passed over by police between every train; roadbed firm and ballasted; and that snake heads were made by breaking of spike heads, and no means of preventing it known; that passage of locomotive may break a spike head, and turn up a snake head under its own train. There is no proof that the alarm whistle was delayed or neglected, or that the brakes were not put on in a reasonable time. No neglect is proven on the plaintiffs' servants on the train, by showing any particular act done or omitted. Nor is there particular proof that any part of this portion of the road was not at that time in good order for this kind of road.

By the law they are bound to the utmost diligence and care, and are liable for slight negligence. Proof that defendant was a passenger, the accident, and the injury, make a *prima facie* case of negligence. This is done, and the burden of explaining is thrown upon the plaintiffs.

One explanation is, that his negligence in leaping from the car, when there was no danger on it, occasioned his injury. The car was not overturned, nor was any one injured who remained in it. Doubt-

less, the leaping was the immediate cause of the injury. But this is answered by the circumstances. Such an act the law deems a natural and prudent precaution to extricate a person from peril, under such circumstances, as for the moment present it as the least evil of a perilous alternative. Story on Bailments, sec. 598; *Jones v. Boyce*, 1 Stark. 493 (1); *McKinney v. Neil*, 1 McLean, 540 (2); *Stokes v. Saltonstall*, 13 Pet. 181; *Ingalls v. Bills*, 9 Metc. 1; Angell on Carriers, sec. 547. But a rash and undue apprehension of danger on the passengers' part may not justify the act as without culpability. It is not to be expected that passengers, under such circumstances of apparent peril and excitement, and frequently of great confusion, can exercise any great degree of calmness and deliberation; nor are we very well qualified to judge for them, upon hearing a relation of the facts. All must be left to a jury. We cannot condemn this act, under these circumstances, by a knowledge of the final issue of it.

Another answer given to the *prima facie* case is to be found in the fact, that the passenger cars being full, the defendant was received as a passenger into the baggage car. The law requires common carriers of passengers to take and carry every one who desires to go, provided they have room, and there be no objection on account of the condition, habits, character, deportment, or purposes of the passenger. *Jencks v. Coleman*, 2 Summ. 221; Angell on Carriers, sec. 524; Story on Bailments, secs. 591, 591 a. But at the same time they have the right to prescribe reasonable rules and regulations for the convenience, safety, and comfort of themselves and passengers. *Jencks v. Coleman*, *ubi supra*; Angell on Carriers, sec. 530.

Herein lies the merits of this case. The passenger cars were full, and plaintiff was so notified. He was received, and took passage for this trip in the baggage car. The contract was for a passage in that car. The carrier would have no right to overload and crowd passengers already in the other cars. When passengers take their seats, they are entitled to occupy as against the carrier and subsequent passengers. While this right is recognized and protected to them, they are required to conduct themselves with propriety, not violating any reasonable regulation of the train; nor have they a right to

1. In *JONES v. BOYCE*, 1 Stark. 493, it was held that if, through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger is placed in so perilous a situation as to render it prudent for him to leap from the

coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.

2. *McKinney v. Neil*, 1 McLean, 540, is reported in 7 Am. Neg. Cas. 612.

interfere with the seats and accommodations possessed and secured by other passengers; they are not entitled to make the length and breadth of the train a common possession; nor should they disturb the quiet and convenience of others, or interfere with the management of the train by passing from car to car, unless for seasonable refreshment and other reasonable purposes.

The proofs show in this case that the baggage car was not thrown off the track, nor in any danger. Had the plaintiff below remained in the car in which he engaged his passage, and in which plaintiffs here agreed to receive and take him, the necessity for leaping off would not have arisen, even in the mind of a timid person. But he, with the others taking passage in the same car with him, got into a play and scuffle, which brought on a racing through the other crowded cars; and in one of which plaintiff was brought to that apprehension of imminent peril which induced him to leap from the car. Had he remained in the baggage car he would, doubtless, have been preserved from this injury. This was culpable negligence in him to put himself into the position, and contrary to the terms upon which he was received as a passenger, which made the leap necessary to escape the peril.

The 11th instruction embodies the facts, of the cars being off the track, the rate of speed they were going, and the leap; and then directs the jury to justify the leap, if the other facts presented reasonable grounds of apprehension. All the facts may be so, and yet if he brought this peril on himself alone he might still not be entitled to recover. Notwithstanding this proof was before the jury, this instruction does not leave the conclusion to be drawn open to be varied by it.

The 13th instruction is obnoxious to the same objections. The "scuffling and playing" did not produce the injury. They were mere inducements to the acts that followed, the chase through the cars, the obtrusion upon the rights of the other passengers, and the going into the position of danger. The instructions being predicated upon the facts or part of the facts should have been so drawn as to allow the jury to arrive at a conclusion upon all the material facts bearing upon the point or question instructed upon.

These companies operate with a powerful and dangerous agent, and must be held to a strict liability for care, skill, caution, and diligence. But at the same time we must expect a proportionate degree of prudent discretion in the travelling public, according to the degree of danger in this mode of conveyance, so that this liability of companies may not be unnecessarily increased.

We think the 11th and 13th instructions should have been modified. Nor are we able at all to arrive at the same conclusion with the jury, upon the facts, taking the defendant's conduct in changing cars into consideration, and which seems to have been excluded by these instructions. The question is a new one here, and for greater satisfaction in settling a precedent, we will send the cause back for another trial.

Judgment reversed.

GALENA AND CHICAGO UNION RAILROAD COMPANY v. FAY.

Supreme Court, Illinois, June Term, 1855.

[Reported in 16 Ill. 558.]

CARRIER AND PASSENGER—MUTUAL NEGLIGENCE.—The doctrine in relation to the mutual negligence of parties, in causing an injury, as affecting the right of parties to recover therefor, is applicable to passengers carried upon railroads.

SAME—DUTIES.—A passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects; but the care, vigilance and skill of the parties furnishing the conveyance, should be adapted to it; the carrier and the passenger owing reciprocal duties each to the other.

CONDUCT OF PASSENGER—EVIDENCE.—The conduct of passengers on a railroad, on the happening of an accident, though not in the presence of a party who is injured, may be given in proof, to show how the apparent danger impressed others.

IMPEACHING WITNESS.—Where a proper foundation has been laid for it, a witness may be inquired of as to what another witness stated in reference to his own conduct, and that of the plaintiff, just prior to an accident, for the purpose of impeaching the witness by showing a contradiction to his previous answer.

CARRIER NOT AN INSURER.—A carrier of passengers is not an insurer against all accidents, but is liable only for the want of a suitable degree of care, diligence and skill.

CONTRIBUTORY NEGLIGENCE.—If a passenger on a railroad car is guilty of negligence, by unnecessarily exposing himself to danger, by wrestling or scuffling on the cars, or by imprudently and unnecessarily passing from one car to another while the cars are in motion, and receives an injury, and his carelessness or imprudence has contributed in any way to produce the injury, he cannot recover for it.

SAME.—If a passenger on a railroad car imprudently and carelessly exposes himself to danger, by scuffling or playing, and is injured while being transported on the cars, and his imprudence or carelessness has

in any way contributed to produce the injury, he cannot recover for it; nor is it necessary that the imprudence or carelessness of the passenger should be restricted to the moment of the accident.

SAME.—If a passenger who is being conveyed on a railroad car is guilty of a want of reasonable care, and his want of such care concurs with that of the railroad company in producing an injury, to him, he cannot recover for it.

LEAPING FROM CAR.—A railroad company, in an action brought by a passenger who leaped from a car when an accident occurred, to recover for injuries, may show that the injury resulted from the carelessness or culpable negligence of the passenger, prior to the accident.

BURDEN OF PROOF.—A passenger who seeks redress from a carrier, for an injury, must show not only that the injury to him was the result of the carelessness or negligence of the carrier, but also that he himself was without fault in producing the injury; and the burden of proof is on him, not only to show that the carrier was negligent, but that he himself was not guilty of negligence.

PASSENGERS—NEGLIGENCE.—Carriers are not bound to answer for all the lower degrees of carelessness and negligence on the part of passengers carried by them, short of recklessness or carelessness.

ACTION on the case for personal injuries. Tried at May Term, 1854, of Kane Circuit Court, before Hon. B. S. Morris and a jury. Verdict for plaintiff for \$2,500.

The testimony shows that in the month of August, Fay, with two others, got on plaintiff's cars at Elgin to ride to Clinton, a distance of some three miles. The train consisted of the locomotive and tender, then a baggage car, next a second-class car, and, behind all, a first-class car. When the defendant and his companions presented themselves to ride, they were told by the conductor of the train, "that the passenger car was full, and they must, or had better, get into the baggage car." They thereupon went into the baggage car. Soon after the cars left Elgin, the defendant and his companions commenced playing and scuffling; it was warm weather, and they pulled up each other's shirts. From Elgin, about one and a half miles, was a T rail, then there was the flat or strap rail. Soon after the train came upon the strap rail, the hind trucks of the second-class car and the forward trucks of the first-class car, were thrown from the track by a snake head, probably. The speed of the train had slackened upon coming upon the strap rail, and it was running at the time at a safe and proper rate of speed. The brakes were put down, and the train stopped as soon as possible. *The baggage car was not off the track, nor in any danger.* Just before this accident, the defendant had chased one of his companions out of the baggage car into the second-class car, and he was in the second-class car, or upon the platform,

at the time, and he jumped from the car to the ground and received the injuries complained of. At the time he jumped the cars were moving at a slow rate of speed, say three to four miles per hour. The defendant's companions and two others (who were not regular passengers, and who were upon the platforms of cars), also jumped off, and one of defendant's companions (Yarwood) was injured by so doing. No other person was injured. Those remaining in the cars were not injured. There were two other persons in the baggage car, who remained there, and experienced no difficulty or injury in so remaining. This part of the road was recently repaired, and in very good order. It was passed over daily, and generally after each train, by persons whose duty it was to keep it in repair. The accident occurred about 4 o'clock P. M., and one train had passed over between the examination and this train. That this was as good as any flat railroad, and was well gravelled and ballasted.

A number of instructions were requested by both parties, the nature of which is indicated in the opinion. *Judgment reversed.*

R. PECK and J. F. FARNSWORTH, for appellants.

T. S. DICKY and S. WILCOX, for appellee.

Seaton, Ch. J. — As the injury happened at the same time and the facts are so much like those in the same plaintiffs against L. H. Yarwood before us, in 15 Ill. 468 (1), as to involve the same principles of law, we have again carefully examined the principles there laid down, and fully approve them, believing them sustained by settled adjudications and text writers. It is objected that the doctrine in relation to the mutual negligence of the parties causing the injury, is not applicable to carriers of passengers by railroad, and should not be applied as in that case. To our mind, there is no apparent ground or reason for distinction or difference. The degree of responsibility and care between goods, or inanimate things, and reasonable beings having volition, is found in the difference between property and persons, and is not referable at all to modes of conveyance. I know of no case making any distinction. As to the latter, Justice McLean well remarks, in *McKinney v. Neil*, 1 McLean, 550 (2), that "we are surrounded with dangers at home and abroad, and they are greater when we travel than while we remain stationary. In some modes of travelling these dangers are greater than in others. They may be greater on water than on land; on a fast line of stages than on a

1. See the preceding case reported. 540, 550, is reported in 7 Am. Neg. Cas. 612.

2. *McKinney v. Neil*, 1 McLean,

slow one; and every passenger must make up his mind to meet the risks incident to the mode of travel he adopts, which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance. This is the only guaranty given by the proprietor of the line." If one will take passage in a balloon, he should not expect or require the conductor to insure his life, limb, or safe passage, nor to do more than exert the greatest degree of care, with competent skill in that mode of sailing. Nor can passengers by steam power, either in boats or on railroads, expect the same degree of security that they would enjoy by wagons, canal packets, or stage coaches. The degrees of care, vigilance and skill are the highest, and the responsibility is for the least neglect known to the law short of insurance. And these, in their application, have respect to the particular mode of travel or transportation offered. The care, vigilance and skill must be adapted to the motive power and means. A servant well qualified to steer a boat or manage a team, might be totally unfit to manage steam, or regulate the running of a boat or locomotive. The means should be reasonably adapted to the end, and the care and skill to the use of the means, whether of one or another mode of transportation. These differences we recognize as within the rule of diligence. But while the care, skill and diligence are judged of in reference to what is required by the dangerousness of the particular mode, we can see no propriety or justice in relaxing from a proportionate care on the part of passengers, according to the increased hazard of the mode of transportation adopted by them. This is surely reasonable, and must continue to be a reciprocal duty to carriers by railroads. See 13 Barb. 14.

Upon the evidence, contradictory as it is, we shall not interfere with the verdict. Upon the question of a special passage in the baggage car, the evidence in the case, unlike the case of Yarwood referred to, is conflicting. The jury were judges of what was before them, and they have settled the facts under instructions.

The conduct and exclamations of passengers in the cars were not improperly admitted, as tending to show how the circumstances of apparent danger impressed every one, and, to some degree, explain defendant's conduct, and vindicate it from rashness and imprudence from undue alarm. It is impossible for a witness to convey such scenes to the mind and their effect and influence upon it. Such general conduct, with the exclamations involuntarily thrown out by appearances of imminent peril, may be regarded as a part of the *res gestæ* for this purpose.

A proper foundation for asking Brewer for the statement of Yarwood had been laid, by the preliminary question to, and answer of Yarwood, for the purposes of impeachment. The matter was relevant, as tending to show a contradiction, and the time and place, and persons connected with the conversation or statement, were certain and specific. Brewer was the person, and it was on the cars, just before the accident. All the pre-requisites, laid down by Mr. Greenleaf, are found in the questions put to and answered by Yarwood. 1 Greenl. Ev. §462. The question should have been allowed, and answered by Brewer.

The first part of the third instruction asked by plaintiffs in error, we again sanction as correct, but the latter part we will again repeat, as we said in 15 Ill. 469, "is too narrow, and does not express the full degree of plaintiffs' liability as common carriers of passengers." We see no propriety in attempting new definitions, or departing from the common and well understood terms, for expressing the degrees of both diligence and negligence. When parties persist in attempts to use new and indefinite expressions, we cannot but be strongly impressed with the belief that the usual ones do not suit their purpose. The care and diligence of "cautious" persons, is indefinite, uncertain, and no two minds would agree as to the degree indicated.

The fifth, sixth and seventh instructions, asked by appellants, were fair statements of the law, and should have been given. Number four, given in lieu of number seven, is too restrictive. It confines the want of reasonable care to the moment of the accident, and excludes all consideration of a previous want of care; at least, so we understand it. Now the leap at the moment taken, and under the circumstances, might have been prudent and defensible, and yet a previous want of care, or culpable negligence, may have brought him into the situation, to make it necessary and justifiable. Previous acts of appellants, and want of care, diligence and skill in building, equipping, running, repairing and operating the road up to the moment of the accident, so far as they tended to show culpable negligence in the alleged injury, were proper subjects of inquiry, and might be embraced within instructions. So, in like manner, they have a right to show that the injury was the consequence or result of defendant's want of care or culpable negligence at any time, or that such negligence contributed to produce it. Suppose he should have done an act hours before, or miles distant, from the time and place of the injury, which contributed to it, can this be separated and excluded from our consideration? Suppose he had carelessly placed articles

upon the platforms of the cars, liable to be shaken off and across the track, and they were carelessly suffered by the servants of the company to remain until thrown under the wheels, and the cars be thrown off the track thereby, would a justifiable leap, after the necessity occurred, exculpate his previous carelessness, although he might show theirs? Giving such instructions does not depend upon the sufficiency of the evidence offered, but upon the fact that there is evidence tending to establish the fact alleged. Here there was evidence to that point in the defense, and the court should have instructed the jury of its legal consequences upon defendant's rights, in case they believed such negligence proven upon him. This was fully discussed and settled in principle in 15 Ill. 468, and the Aurora Branch R. R. Co. v. Grimes, 13 Ill. 585. This last case has also settled the principle contained in the eighth and ninth instructions asked, and is fortified by the case of Haring v. N. Y. and Erie R. R. Co., 13 Barb. 14, and Moore v. Abbott, 32 Me. 49; Angell on Carr., §§556, 557.

These instructions were proper and should have been given.

After a careful consideration of the eleventh and twelfth instructions, we are unable to detect any substantial objection to them, and think they should have been given.

The thirteenth and fifteenth were proper, and should have been given. We think the modifications given by the court in lieu of those asked, have expressed too strong a degree of carelessness. It is enough in law to constitute a defense, that the negligence and carelessness caused or contributed to the injury complained of. Where these are shown, courts and juries cannot adjust their degrees and gauge their effects, nor will the law hold carriers to answer for all the lower degrees, until they amount to *rashness* and *recklessness*. This would add to the highest degree of care, imposed by law upon carriers, an additional responsibility for the negligence and carelessness of passengers short of gross negligence. But such is not the law, and we cannot sanction instructions so stating it; nor shall we here undertake to say how slight a degree will destroy the right of reparation.

The ninth, given in lieu of the sixteenth asked, was proper.

The sixteenth belongs to a class condemned by this court in 15 Ill. referred to, and is properly modified in number twenty-one.

The seventeenth and nineteenth should have been given. The eighteenth was properly modified.

The degrees of care of the plaintiffs, and negligence of defendant,

as presented in the ninth and tenth instructions given for defendant here, are not accurately presented. The "utmost possible care," and "slightest neglect," are superlative terms, unsafe and improper to be indulged in, as expressive of the requirements of the law, while it requires, at the same time, the highest degree of the one, and charges for slight neglect. So, for the other party, prudence, "simply such as ordinary men usually exercise," is very indefinite, and may fix no rule or standard at all in law.

As the cause must be again tried, we have examined and discussed these instructions in detail, numerous as they are, in the sincere hope to present what we regard as the settled principles of law, applicable to such injuries.

We can but think the principles all plain, and easily to be understood as laid down in the decisions of courts; and if these were plainly and fairly drawn out into instructions without embellishments of superlatives, or garnishment of partial statements of facts, juries would easily comprehend the mutual duties and liabilities of the parties, and adjust their rights.

Carriers of passengers are not insurers of life, limb, or against loss, damage or injury, as carriers of goods are, except for acts of Providence or the public enemy; but they are required to use the highest degree of care, diligence, vigilance and skill in the selection of materials, construction of their vehicles, and other means of transportation, and for their conduct and management, repairs and preservation of them, with a view to the comfort, safety and transportation of passengers and their baggage; and they are liable for slight neglect or carelessness in any of these particulars, qualified, however, by the reciprocal duty of the passenger, that his want of ordinary care does not cause or contribute to produce the injury.

Judgment reversed, and cause remanded for new trial.

Skinner, J.—I am unable to concur in all the conclusions and reasoning of the foregoing opinion.

OVERTURNING OF CAR—PRIMA FACIE NEGLIGENCE—BURDEN OF PROOF.—In an action to recover damages for injuries sustained by a passenger while on defendant's train, due to the overturning of the car on which he was riding, it was held that where the passenger shows that he was without fault on his part, a *prima facie* case of negligence is made out against the railroad company and the burden is upon the company to rebut that presumption

by showing that the accident was one for which they could not be held responsible (1).

PAYMENT OF ACCIDENT POLICY DOES NOT RELIEVE RAILROAD COMPANY.—In such action the liability of the railway company is not discharged *pro tanto* by the payment of any sum, on account of such injury, by an accident insurance company, the primary liability being on the railway company.

DAMAGES.—Where there was conflicting evidence as to the plaintiff's injuries, and it appeared that such injuries were temporary, a verdict of \$5,000 would be pronounced excessive, but where there was proof that plaintiff would not entirely recover from his injuries, the verdict would not be disturbed. Judgment affirmed. *E. WALKER*, appeared for appellants; *LYMAN & JACKSON*, for appellee. Opinion by *LAWRENCE, CH. J.* *Supreme Court, Illinois, September Term, 1870. Pittsburgh, Cincinnati & St. Louis Railway Co. v. Thompson*, 56 Ill. 138.

PEORIA AND ROCK ISLAND RAILROAD COMPANY V. LANE (ADMINISTRATRIX).

Supreme Court, Illinois, September Term, 1876.

[Reported in 83 Ill. 448.]

BAGGAGE CAR OVERTURNED—PASSENGER IN DANGEROUS PLACE—CONTRIBUTORY NEGLIGENCE.—Where a person leaves a passenger car and goes into a baggage car, without direction of the railroad company's servants, and is killed by the overturning of the baggage car, the railroad company is not liable in damages, as in leaving a place of safety for one of danger, the deceased was guilty of a high degree of negligence.

APPEAL, from the Circuit Court of Warren County.

Action on the case, by Sylvia L. Lane, administratrix of the estate of Oliver N. Lane, deceased, against the appellant, to recover dam-

1. *OHIO & MISSISSIPPI R. R. Co. v. MUHLING*, 30 Ill. 9 (1861), was an action for damages for injuries sustained by plaintiff by reason of the train on which he was travelling falling through a bridge which gave way owing to its alleged defective building. Verdict for plaintiff for \$1,500. On appeal by defendant judgment was affirmed. The defendant denied liability on the ground that plaintiff was a work-

man in their employ and not entitled to the rights of a passenger. It was held that a railroad's responsibility does not depend on the kind of cars in which passengers are carried nor on the fact of payment of fare by the passenger. Plaintiff being lawfully on the train and the injury being produced by the inefficient structure made by the company, defendant was liable.

ages for the death of her intestate, alleged to have been caused by the negligence of the defendant. The suit was brought in Rock Island county, and the venue changed to Warren county. Defendant pleaded the general issue, and a trial was had, resulting in a verdict and judgment of \$4,708.33 in favor of plaintiff. *Judgment reversed.*

INGERSOLL & PUTERBAUGH and W. S. BUSH, for appellant.

JOHN J. GLENN, for appellee.

Walker, J. — It appears that appellant was the owner of the track, right of way and franchise of the road where this accident occurred. They had entered into an agreement to permit the Rockford, Rock Island and St. Louis Railroad Company to run trains over their road from Rock Island to Orion. The latter road was to pay the former \$31,000 per year, and half of the gross receipts for the local business between the two points. The accident occurred by the overturning of a baggage car in a train belonging to and being operated by the Rockford, Rock Island and St. Louis Company.

It is first urged, that appellant is not liable for the negligence or mismanagement of the employees of that company whilst running on their track—that the Rockford, Rock Island and St. Louis Company are alone liable for their negligence. There is no doubt but they are liable for their own acts, and some courts have held, that the company owning a road is not liable for the negligence of their lessees or of other roads using their track by arrangement or consent. But this court has repeatedly held, that a company holding the franchise and exclusive right to operate a road, must so use it as not to endanger passengers or property, whether the use be by themselves or others they may permit to use the road, and that if they permit another company to run their trains on and over their track, and injury grows out of negligence of the use of the road thus authorized, the company owning the road and franchise will also be liable. *Lesh v. The Wabash Nav. Co.*, 14 Ill. 85; *Hinde v. The Wabash Nav. Co.*, 15 Ill. 72; *Chicago, St. P. & Fond du Lac R. R. Co. v. McCarthy*, 20 Ill. 385; *Ohio & Mississippi R. R. Co. v. Dunbar*, 20 Ill. 623; *Sidders v. Riley*, 22 Ill. 109; *Illinois Central R. R. Co. v. Finnigan*, 21 Ill. 646; *Illinois Central R. R. Co. v. Konause*, 39 Ill. 272; *Toledo, Peoria & Warsaw R. R. Co. v. Rumbold*, 40 Ill. 143. These cases fully settle the rule in this court, nor has appellant's counsel adduced reasons in argument that by any means satisfy us that a sound public policy does not require the rule. It has been adopted with a full knowledge that there are decisions of other courts for whom we have great respect, announcing a different rule.

But there are other courts of equal ability who announce the rule adopted by this court. We can not be expected to change a rule simply to make it conform to that of some other court, arriving at a different conclusion. We have no doubt of the soundness of the rule of this court, and must, therefore, decline to review the conflicting decisions of the various courts. The same rule is announced by the Supreme Court of the United States, in *Railroad Co. v. Barrow*, 5 Wall. 104. See, also, *Nelson v. Vermont Central R. R. Co.*, 23 Vt. 721. This objection cannot, therefore, be allowed.

This being true, it follows that if the switch was not properly locked or otherwise secured, through the negligence of the employees of either road, and the injury was thereby occasioned, appellant would be liable; or if the switch was not properly constructed and maintained, appellant, as the owner of the road, would be liable. On this question there was a large amount of evidence which was inharmonious in its character, and which was for the jury to determine, under proper instructions.

The first of appellee's instructions, to which objection is made, is in entire harmony with the rule above announced, and the same is true of his fifth instruction. We perceive no objection to the eighth or ninth of the series.

The sixth of appellee's instructions is objected to by appellant. It is this:

"The jury are further instructed, that while it is true that the proper place for a passenger, while riding upon a railroad train, is in the passenger coach, yet the jury are further instructed that a passenger may rightfully be in a baggage car, and not thereby be chargeable with negligence such as to excuse the railroad company upon whose train such passenger may then be riding, from the performance of its duties imposed upon it by law in properly building and maintaining its road, with its curves and switches, or persons operating trains of cars upon its track with its consent, from gross negligence in the running and management of a train upon which such passenger may then be riding."

It is urged that this instruction does not state the law correctly, and that it misled the jury.

In the case of *Galena & Chicago Union R. R. Co. v. Yarwood*, 15 Ill. 468 (1), it was held, where the passenger car was full, and Yarwood had paid for a ticket, and on entering the cars was directed by the conductor to go into the baggage car, which he did, but afterwards

1. See this case reported in this volume, page 208, *ante*.

left that car, and whilst standing up in one of the passenger cars it was apparently about to be thrown from the track, and he jumped off and had his leg broken, that he could not recover.

It appeared in that case, that if he had remained in the baggage car, as directed, there would have been no apparent necessity for leaping from the train, and he would not have been injured. So in this case. Had deceased remained in the passenger car, where there was an abundance of room, he would not have been killed. It was by reason of leaving his seat in the passenger car, not by direction of the conductor of the train, but for the purpose of getting a plate of iron and some other small articles in the baggage car, that his death was occasioned. He, as all others, knew that the baggage car is not designed for passengers. It is alone for baggage, express matter, and such articles as passengers may be permitted to place therein as a matter of convenience, and for the use of employees on the train. Where there are large quantities of baggage piled up in that car, in case of accident, persons therein would be liable to have it fall on them, and produce great injury, if not death, as was done in this case. This, therefore, renders it more hazardous than in the passenger cars. They are so constructed as to be free from such or like dangers. He must have known that the payment of his fare entitled him to a seat in a passenger car, and in consequence of that knowledge he appears to have taken a seat therein upon entering the train. The company did not expect or intend that passengers should occupy the baggage car, and hence they had not arranged it with a view to the safety of passengers. Had they designed it for that purpose, they would have arranged the baggage differently, so as to secure passengers from injury from its falling on them.

Deceased left a place of safety and sought one of danger, and thus lost his life. His doing so was not invited or directed by the company. He, in going there, was guilty of a high degree of negligence—so high, in fact, that the company are exonerated from liability, unless the company were guilty of wanton or reckless misconduct on their part. Although the company may have been guilty of negligence (which we do not decide), still we do not see that it was wanton or reckless. The road, at that place, may not have been constructed on the very best plan, yet it was not gross negligence in comparison with that of deceased.

Deceased was manifestly guilty of as great negligence as the company, if not greater. Suppose he had got on the frame in front of the engine, without being directed to do so, and had been injured,

could it be contended that he might recover? Surely not; because he had sought a situation of great peril. When a person takes such and like hazards, of their own choice, they must bear the injury. Had the deceased acted with ordinary prudence, and remained in the passenger car, where it was his duty to have remained, he would not have been killed. Nor does it matter that the conductor testified that passengers could go into the baggage car, as, when a person buys a ticket, the act implies that the company shall furnish him with a seat in a car provided for passengers, and not in a car provided for baggage. Such a ticket does not entitle the passenger to go therein without permission.

The majority of the court hold this instruction should not have been given.

All of appellant's instructions, but the fourth and tenth, which were refused, are in the teeth of the decisions of this court, referred to in the former part of this opinion, and were properly refused. The fourth would have been free from objection had the last clause, referring to negligence of the Rockford, Rock Island and St. Louis Railroad Company, been omitted. The tenth was manifestly wrong as this was a civil action, and all know that in such cases only a preponderance of evidence is required to establish facts, and not that the evidence shall leave no reasonable doubt on the minds of the jury. We are surprised such an instruction should have been asked.

But for the error in giving the sixth of appellee's instructions, the majority of the court hold that the judgment of the court below must be reversed and the cause remanded.

PEORIA, PEKIN & JACKSONVILLE RAILROAD COMPANY v. REYNOLDS.

Supreme Court, Illinois, January Term, 1878.

[Reported in 88 Ill. 418.]

DERAILMENT OF CAR—PRESUMPTION OF NEGLIGENCE.

Where the car on which plaintiff was riding as a passenger was thrown from the track, down an embankment, and plaintiff was injured, the presumption is that the accident was due either to the track being out of order, or the train badly managed, or both causes combined, and the *onus* is on defendant to show that it was not negligent.

DEFECTIVE TRACK.—Where it was shown that the railroad track was in bad condition, and had been for some time prior to the accident, and that the train which was derailed was running at a speed of from

twenty-five to thirty miles an hour, the railroad company was held liable (1).

APPEAL, by defendants from judgment rendered for plaintiff in the Circuit Court, Tazewell County. The facts are stated in the opinion. *Judgment affirmed.*

DEARBORN & CAMPBELL, S. P. SHOPE and **GEORGE B. FOSTER**, for appellants.

ROBERTS & GREEN and **COHRS & RIDER**, for appellee.

Breese, J.—This was an action on the case, brought to the Tazewell Circuit Court, by Henry Reynolds, plaintiff, and against the Peoria, Pekin and Jacksonville Railroad Company, defendants. The declaration contained two counts, in which was alleged the duty of the defendants to keep their track in good repair, and to maintain the rails thereon sound and in good condition; that this duty was neglected by reason whereof the defendants' track, between Virginia and Pekin, was out of repair and unsafe, and by reason of such neglect, and permitting and allowing a rail on the track to be out of repair, and broken and unsafe, the car in which plaintiff as a passenger for hire was being carried, was thrown from the track, and the

1. *Among other actions relating to Derailment of Trains, Due to Condition of Track, are the following:*

HRAZLE v. INDIANAPOLIS, BLOOMINGTON & WESTERN R'y Co., 76 Ill. 501 (1875), was an action to recover damages for injuries sustained by plaintiff while a passenger on defendant's train, due to said train leaving the track. It appeared that the train was not running at an unusual speed; that the track was in good repair and had been carefully inspected; that the accident was caused by a broken rail on the outside of a curve in the road; that plaintiff was found outside the coach from which he must have jumped in the confusion of the occasion, and that if he had remained in the car he would have received no serious injury. On the trial there was a verdict for defendant, which, on appeal, was affirmed, the court (per **SCOTT, J.**) holding that the injury to plaintiff must be attributed, if not

to his own want of care for his safety, to one of those accidents that sometimes occur in extreme cold weather, which no engineering, however skillful, and no management, however, observable, could foresee or guard against.

In **TOLLEDO, WARASH & WESTERN R'y Co. v. BEGGS**, 85 Ill. 80 (1877), it appeared the breaking of a wheel of one of the coaches of the train on which plaintiff was travelling caused the car to be thrown from the track, and plaintiff was injured. Plaintiff was travelling on a pass issued to another person, and passed himself off as such person. *Held*, that in such case the railroad company would only be liable for gross negligence. But even were he travelling rightly on a pass, the contract exempting company from liability would preclude recovery, except in case of gross negligence. (Ill. Cent. R. R. Co. v. Read, 37 Ill. 484, applied. See 9 Am. Neg. Cas. 257,

plaintiff injured. In the other count, the defendants are charged with a want of care in running the train, and want of care in keeping the track in good repair, by reason whereof the car was thrown from the track. There was also a stipulation that the parties would go to trial as on counts charging the injury to have been occasioned by defective equipments in the method of applying the brakes. To all which the defendants pleaded not guilty, and there was a trial by jury, who returned a verdict for the plaintiff. A motion for a new trial having been denied, judgment was entered on the verdict, to reverse which the defendants appeal, and make various points.

The leading facts are, briefly, that on the night of February 20, 1875, appellee purchased a ticket from Virginia to Pekin, on appellants' road. The distance between these points is 86 miles, with several intervening stations. Proceeding north, the southern train was met at Bath, which had just passed over the road. A short distance north of Bath, the car on which was appellee, was thrown from the track, down an embankment, turned bottom side up, and the appellee injured. The presumption, on the occurrence of such an accident, may be either that the track was out of order, or the train

post). Judgment for plaintiff reversed.

CHICAGO, PEORIA & ST. LOUIS R'y Co. v. LEWIS, 145 Ill. 67 (1893), was an action for damages for injuries sustained by plaintiff due to the train on which he was a passenger being derailed. Judgment for plaintiff, which, on appeal, was affirmed. The declaration alleged dangerous rate of speed of the train and unsound condition of the track, thus causing the train to be thrown from the track. Evidence as to condition of the railroad ties shortly after the accident admissible as tending to establish the condition of the same at the time of plaintiff's injury. Affirming 48 Ill. App. 274.

The following actions relate to Derailments Caused by Collision with Animals on Track:

In CHICAGO, ROCK ISLAND & PACIFIC R. R. Co. v. MCARA, 52 Ill. 296 (1869), plaintiff was injured by reason of the train on which he was

riding being thrown from the track by collision with a cow. Judgment for plaintiff for \$5,000 reversed on the ground of excessive damages, the injuries not being serious.

TOLEDO, WABASH & WESTERN R'y Co. v. FOSS, 88 Ill. 551 (1878), was an action for personal injuries sustained by plaintiff while a passenger on defendant's car, due to the train colliding with a horse on the track, whereby the train was derailed. Judgment for plaintiff was reversed on appeal, on the ground of erroneous instruction on the question of negligence of railroad company in failing to use air brakes, etc., where the declaration simply averred negligence in careless running of train.

ATCHISON, TOPEKA & SANTA FE R. R. Co. v. ELDER, 149 Ill. 173 (1894), was an action for personal injuries sustained by reason of train striking cow on track and being derailed. Judgment for plaintiff for \$2,500 affirmed.

badly managed, or both causes combined to produce it, and the *onus* is on the company to show they were not negligent in any respect. The charge here is, the bad condition of the track and want of care in running the train.

A large volume of testimony was taken on both sides, which we have read with care, and we are satisfied the presumption has not been removed by any evidence produced by appellants, or by anything to be found in the record. We understand appellants as admitting the accident was caused by a broken rail, and as claiming that the breakage was caused by the unprecedented cold of that month.

The evidence will not permit us to come to this conclusion. There is some conflict in the testimony on this point, but giving to it all the force appellants claim, it falls far short of establishing their claim. That severe frosts cause contraction of iron rails, and heat expands them, thereby causing fractures, is undeniable. The evidence is conclusive that the track of this road, as a railroad, was in bad condition, and had been for some time prior to the accident. It was proven that pieces of old rails had been put in to repair damaged rails, and at the point where this accident occurred a piece of an old rail, about four feet long, had been inserted, and all the rails laid in the discarded chair, rejecting the use of the fish-plate—a safe and the most approved mode of connecting rails. Every one of common observation knows that if a railroad track is made up of short pieces of iron rails, secured in that way, and resting upon old and decaying ties, that travel on it can not be safe, and a road so constructed is not properly constructed. It needs no expert to ascertain this. The shorter rails are, the more joints there will be. They will become depressed and battered, and insecurely held by the chair. The rush of a heavy engine and train of cars over them must greatly increase the danger. Appellants say that, two or three weeks prior to the day of the accident, a broken rail had been discovered at the place of the accident, and it is strange to learn from them how it was repaired. They say, the ties being frozen solid in the ground, the section foreman cut about four feet off the end of the broken rail and inserted a sound piece of rail, of the proper length, placing chairs under each end of the piece so put in, spiking each chair down to the tie with four spikes, and double spiking the piece on each side to the center, or underneath the rail. We agree with appellee, that this mode of repairing is evidence of itself of great negligence. It was at this point the accident occurred, and appellants were admonished there was a weak and dangerous point in their road, and common sense, it

would seem, should have suggested to them it could be made more safe by using an entire rail—not by chipping a piece off an old and battered rail, but by an entirely new rail. This common prudence should have taught them. It needs no testimony to prove that a long, new rail is safer than a piece four feet long, of an old rail, which had been used for years. Some of the experts testified that they did not know of any safer way to make a repair than the one adopted. They will, probably, know a better way in the future.

This road, from all the testimony, we should consider as out of order, dangerous and unfit for travel with safety. Its condition admonished appellants that the danger of travel would be greatly enhanced by a high rate of speed. There is some contest on this point also, but we think the weight of the evidence is, the train was running at the rate of 25 or 30 miles an hour, and one of the employees—the conductor, perhaps—was heard to say he had to make up some lost time, and as it was Saturday, the last run of the week, it is quite certain they did not jog along quietly. But if more convincing evidence is wanting of the rate of speed, it may be found in the circumstances attending the accident. The car, after leaving the track, was hurled down the embankment, against a fence, distant twelve feet from the bottom of the slope, and bounced from the fence sixteen to twenty feet, bottom side up, striking a telegraph pole, and breaking that off within eight feet of the ground. To have produced such results the speed must have been very high. The proof is by no means satisfactory that this break of the rail was caused by cold, as there was no extreme cold in that month. The weight of the evidence clearly is, that the defective repair and the high rate of speed caused the accident.

Something was said about insufficient brakes, and that was embraced in the stipulation, but there is nothing in the record to show this want of sufficient equipment, in that respect, contributed to the accident.

We are of opinion the jury decided right, on the evidence, and we are satisfied it fully sustains the verdict.

The judgment is affirmed.

STREET CAR DERAILED AND RUNNING OVER EMBANKMENT—INTERROGATORIES—COSTS—PRACTICE.—In an action to recover for injuries sustained by a passenger caused by a street car running off the track, the Supreme Court, in reviewing the case on appeal, said (per CARTER, J.): "The plaintiff, at the time she was injured, was a passenger on one of defendant's street

cars, propelled by electricity, in the city of Elgin. The car, while running down grade, left the track and was precipitated over a high embankment, whereby appellee sustained permanent injuries. The negligence complained of was (using the language of the declaration) in running the cars "at a very high and fast rate of speed, to wit, thirty miles per hour, which is a much greater rate of speed than is permitted by law, and said defendant company permitted and allowed the roadbed and rails on said street railroad to become out of repair, the roadbed to be of an uneven grade, and the rails to become spread apart and the track not of uniform width, and to become in such condition as to make the running of cars over said road and rails dangerous, and in consequence of the careless management of the defendants, said car, while the same was conveying the plaintiff on said South State street nearly to the intersection of Locust street, became and was upset, overturned and thrown from the track, down a steep embankment," etc. A trial before a jury was had, which resulted in a verdict for the plaintiff for \$7,275, and judgment for this sum was entered by the trial court. On appeal to the appellate court, and after the filing of the record and briefs in that court, appellee filed a *remititur* for \$3,275, and the judgment of the trial court to the extent of \$4,000 was affirmed. The present appeal is from said judgment of affirmance prosecuted by the appellant company.

"It is urged by appellant that the trial and appellate courts erred in holding that the second and fourth special interrogatories submitted by appellant's counsel were not proper to be given to the jury for special findings. These interrogatories were as follows.

"Second—Do you find, from the evidence, that there was any cause for the car mounting the track at the place it first went upon the rail, and if so, what was such cause?

"Fourth—Do you find, from the evidence, that there was any apparent cause for the accident, at the time of the accident, at the place where the car wheel first mounted the rail, and if so, what do you find, from the evidence, such cause was?"

"It was among other things said in *Chicago & Northwestern R'y Co. v. Dunleavy*, 129 Ill. 132, when the statute relating to special findings of the jury was first presented to this court for its consideration (p. 143): 'In giving construction to the statute, the first, and perhaps the most important, question, relates to the scope and meaning of the phrase, "material question or questions of fact." May such question relate to mere evidentiary facts, or should they be restricted to those ultimate facts upon which the rights of the parties directly depend? Evidently the latter. Not only does this conclusion follow from analogy to the rules relating to special verdicts, but it arises from the very nature of the case. It would clearly be of no avail to require the jury to find mere matters of evidence, because, after being found, they would in no way aid the court in determining what judgment to render.' The question here presented was fully considered in that case, and the ruling there made has been followed in all subsequent cases where the question has arisen. See *Lake Erie*

& *Western R. R. Co. v. Morain*, 140 Ill. 117; *Pressed Brick Co. v. Reinneiger*, 140 Ill. 334; *Norton v. Volzke*, 158 Ill. 402; *Terre Haute & Indianapolis R. R. Co. v. Eggmann*, 159 Ill. 550, and cases cited.

"But it is contended by counsel for appellant that the questions of fact sought to be submitted did not call for findings of mere evidentiary facts, but of controlling facts in the case. In this we cannot agree with counsel, but are constrained to agree with the appellate court, that the answer of the jury to either one of the interrogatories would not, had answer been made, have been of a controlling character in the case. Let it be supposed that the jury would have found, in response to the second interrogatory, that there was a cause for the car mounting the track, and that the cause was the cobblestone found on the inside flange of the west rail of the track, as contended by appellant's counsel. It would not have followed, as matter of law, that the car would from that cause have been precipitated down the embankment and the consequent injury to appellee produced. It might still have been that the overturning of the car down the embankment, which caused the injury, was caused by the negligence of appellant in running the car at an undue and unlawful speed, as alleged. The court could not say, as matter of law, that the mere mounting of the track by the car caused the injury to appellee. It would therefore seem clear that a further finding of fact would have been necessary before any conclusion of law could have been drawn. The finding called for, therefore, was of a mere evidentiary fact. The fourth interrogatory is different, in that it called for a finding as to the apparent cause of the accident, (rather than of the mere mounting of the track by the car), but confined it to, and assumed that if any cause appeared it appeared at the place where the car wheel first mounted the rail. It is clear that the purpose of both interrogatories was substantially the same—that is, to procure a finding that the car was caused to leave the track by the stone which some of the witnesses testified was found crushed upon the flange of the rail. This interrogatory, when applied to the evidence, is not very clear and definite in meaning, and the phrase 'apparent cause of the accident' might have been understood by the jury, in view of some of the evidence, to relate to what may have appeared to be, but was not, the real cause of the accident. But if by the word 'apparent' was meant 'plain,' 'visible,' or 'evident,' we are still of the opinion that the interrogatory was properly refused, as one calling for a special finding of mere evidentiary facts." * * *

"It is further assigned for error, and insisted upon here, that the appellate court erred in affirming the judgment for \$4,000 after appellee had remitted all in excess of that amount, and also in rendering judgment against appellant for costs made in the appellate court [60 Ill. App. 173]. The same question presented by the first branch of this contention was considered and the authorities reviewed in

North Chicago Street R. R. Co. *v.* Wrixon, 150 Ill. 532 (1), and it was held that such was the uniform practice in all the courts of this State, and that it ought not now to be changed. We see no occasion for reviewing the question, but regard it as one finally and properly settled. But there was error in rendering judgment in the case at bar in the appellate court against appellant for the costs in that court. Appellant was compelled to appeal to get rid of an erroneous judgment. The error was cured in the appellate court by appellee entering a *remittitur* of the excessive damages; but the costs of appeal had been incurred, and they should have been adjudged against appellee. This precise question was decided by this court in *Snell v. Warner*, 91 Ill. 472. See, also, cases there cited, in *Welsh v. Johnson*, 76 Ill. 295; *Trustees of Schools v. Hihler*, 85 Ill. 409; *Dowty v. Holtz*, 85 Ill. 525; *Bristow v. Catlett*, 92 Ill. 17.

"Our attention is called to the fact that in the *Wrixon* case, *supra*, judgment was rendered in the appellate court for costs in that court. The contention there was as to the practice of permitting a *remittitur* to be entered in actions *ex delicto* in the appellate court, and the question as to the proper judgment for costs seems to have passed unnoticed. But the point is made and insisted on here, and it must be sustained. As was held, however, in *Snell v. Warner*, *supra*, the error affects only so much of the judgment as relates to the question of costs of the appeal in the appellate court. The judgment is not otherwise incorrect, and it will be affirmed.

"The judgment for costs alone will be reversed, and the cause remanded to the appellate court, with directions to enter judgment for all costs made by the appeal to that court, up to and including the *remittitur* against the appellee." Affirmed in part and reversed in part. A. H. BARRY (BOTSFORD & WAYNE and D. B. SHERWOOD, of counsel), appeared for appellant; IRWIN & EGAN, and J. A. RUSSELL, for appellee. *Supreme Court, Illinois, June, 1890. Elgin City Railway Company v. Salisbury*, 162 Ill. 187.

CHICAGO AND ALTON RAILROAD COMPANY v. PONDROM.

Supreme Court, Illinois, September Term, 1869.

[Reported in 51 Ill. 333.]

PASSENGER'S ARM PROJECTING FROM CAR STRUCK BY TRAIN—RAILROAD LIABLE.—Where a passenger on defendant's train had his arm resting on the window and slightly projecting from the car and in passing a freight train his arm was struck and broken, the defendant was held liable, the negligence of the passenger being slight

1. *North Chicago Street R. R. Co. v. Wrixon*, 150 Ill. 532, is reported in 2 Am. Neg. Cas. 708.

compared with that of the defendant in permitting an obstruction so close to the track as to render it dangerous for passengers to permit their hands to pass a few inches beyond the outside of a car window.

APPEAL, from the Circuit Court of Cook County. The facts appear in the opinion. *Judgment affirmed.*

A. W. CHURCH and JOHN N. JEWETT, for appellants.

E. W. EVANS and COOPER & PACKARD, for appellee.

Walker, J.—It appears that appellee was a passenger on appellants' road on the afternoon of the 17th of September, 1867, from Bloomington to Chicago. He had purchased a ticket for a first-class car, and left Bloomington at noon and arrived at Chicago at 9 o'clock of the evening of the same day. On approaching Twelfth street, it appears that the train stopped as usual, and appellee swears he saw a long freight train on the right hand side of the car in which he was sitting. He seems to have been by a window on that side. He seems to have remained in his seat and had his arm resting on the window sill, while the window was open, and he swears that as the train was approaching Twelfth street, his right arm was seized by some sharp pointed instrument and was drawn out of the window, and forced back against the rear window frame and was broken just above the elbow joint.

Another witness swears that he was at the time looking at appellee, and that his arm was resting on the window sill and his hand hanging down on the inside of the car. Neither witness saw what it was that came in contact with appellee's arm. An inspection of the sleeve of the coat worn by appellee at the time, submitted to us by agreement of counsel for our examination, shows, that on the under side of the sleeve, near the lower end, the cloth was considerably broken and torn. The theory of appellee's counsel is, that some iron instrument, protruding from the rear end of the freight train, entered the car window and came in contact with appellee's arm near the wrist, and pulled or forced it backward until it was fractured above the elbow, the face or side of the window forming the fulcrum. Appellants' counsel contend that his arm was outside of the window and came in contact with some stationary body, by which it was forced backward against the window frame and thus broken.

We are unable to conceive how an instrument could be contrived or formed, attached to the corner of a freight car, that could pass into a window and seize a man's arm near the wrist, hanging down several inches below the base of the window, and not only so, but seize it on the under side of the arm, and hold it firmly and force the

arm back, as this seems to have been done. If not impossible, we suppose it to be extremely improbable. We can find no solution to the occurrence in that mode, yet this seems to have been the theory of both appellee and the other passenger. If an iron instrument of sufficient length to enter the car far enough to accomplish this purpose, had protruded from the rear end of a freight car standing near the track when this train passed, it certainly would have come in violent contact with the front part of the coach in which appellee was riding, and the friction would certainly have been so violent as to have attracted the attention of all persons in the car. Again, the wrist, when the force was applied, from the description of its situation given by appellee and the passenger, must have been at least four or five inches in from the outer surface of the car, and it may be asked, how it could have passed the forward part of the train and this car without being broken off or bent so that it would not have passed so far into the car window as to produce the results that it is insisted were thus accomplished.

Nor do we see that it is in the least probable that such an instrument could have been thrust into the window by the backing of the freight train. It is true, that if a spike or bar of iron had protruded backward from the rear of a freight car, and it had been backing at the time, it is not impossible that the iron rod could have entered the window, but is impossible that it could, after entering the window some four inches above the wrist, have instantly, by its own gravity, curved downward so as to come in contact with the under side of the wrist; and the same may be said if the freight car was stationary. We are, for these reasons, satisfied that the injury was not inflicted in that mode, although appellee and the other passenger no doubt honestly believed that it was. Neither of them saw the instrument that produced the injury, as it was sudden, unexpected and startling; they were most probably not observant of all the surroundings and their relations to each other. Not having expected the occurrence, perhaps neither of them was noticing the actual position of appellee's arm at the time of the contact.

While at most, we may, with the facts we have before us, be able to do more than arrive at a reasonable conclusion, still it appears to us that the most natural and probable theory is, that appellee had his elbow resting on the window sill, with his arm extending outward and upward, and in passing the rear end of the freight train, it was so near the passenger car that his wrist came in contact with the corner of the rear car; and if the speed was sufficiently rapid, the

force would be so great that the arm would not be readily withdrawn, and as the pressure increased it would not only force the arm back until it was broken, but it would render the slipping of the arm so difficult, that as it dragged past, it would most likely produce rents in the sleeve, at the place and of the shape found to have been made in the coat sleeve. This, we think, was the manner in which the injury most probably occurred. This, to us, seems reasonable and satisfactory.

The question then arises, whether, having the arm casually outside of the car in that manner, was negligence, and if so, was there greater negligence in the company in permitting its freight cars to stand so near the track as to produce the injury in the manner we suppose it occurred; and if both parties were guilty of negligence, was that of appellee relatively slight when compared with that of appellant? For a passenger to allow his arm to rest on the window sill and slightly project beyond the outside surface of the car, may be in some degree, negligence, but observation teaches that to do so is not uncommon with passengers. It is frequently done through inadvertence, and when done intentionally, it is upon the supposition that all railway companies have their track free from obstructions, and that they permit nothing to remain so near to the track as would render it dangerous to permit the hand to pass a few inches beyond the outside of a car window.

We have been referred to a number of cases in other courts, and the earlier cases decided in this court, as announcing the rule, that where there is contributory negligence, the plaintiff cannot recover. The established doctrine of this court is, that where the negligence of the plaintiff is slight as compared with that of the defendant, a recovery may nevertheless be had. We are fully aware this is apparently opposed to the decisions of some courts, but it is more apparent than real, as recoveries are permitted in those courts where acts of the plaintiff should be regarded as slightly negligent, not equal to ordinary care; and by requiring the greatest possible precaution on the part of the carrier (1).

In the case of *Spencer v. The Milwaukee & Prairie du Chien R. R. Co.*, 17 Wis. 487 (2), a case very similar in all of its material facts to the case at bar, the court say:

"When we consider the manner in which railroad cars are usually

1. The doctrine of comparative negligence is now abrogated in Illinois. See note on this subject in 2

Am. Neg. Cas. 646-647.

2. Reported with the *Wisconsin* cases in volume 10.

constructed—with windows so that they can be opened, and arranged at a sufficient height from the seat so that passengers will almost unconsciously place their arms upon the sill for support—there being no bars or slats before the window to prevent their doing so—then to say that if a passenger's arm extends the slightest degree beyond the outside surface, he is wanting in proper care and attention, and if an injury happens he cannot recover, because his conduct must have necessarily contributed to the result, appears to us to be laying down a very arbitrary and unreasonable rule of law.

"It is probably the habit of every person, while riding in the cars, to rest the arm upon the base of the window. If the window is open, it is liable to extend slightly outside. This we suppose is common habit.

"There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so, to accommodate the motion of the car.

"Passengers know this, and regulate their conduct accordingly; they do not suppose that the agents and managers of the road suffer obstacles to be so placed as to barely miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence."

In the case of *Laing v. Colder*, 8 Penn. St. 479 (1), it was held, that a person travelling on a railroad car, who permitted his hand to extend outside of the window, and thereby had his arm broken in passing a bridge, could not recover if the agents of the company had given timely notice of the danger which the plaintiff might have avoided. It will be observed, that this case turns upon the fact that notice had been given to the passenger not to put his hand outside of the window. Had the notice not been given, we may infer, the court would have held the company liable.

In the case of *The New Jersey Railway Co. v. Kennard*, 9 Harris, 203 (2), the same court say, that, "A carrier of either goods or passengers, is bound to provide a carriage or vehicle, perfect in all its parts; in default of which he becomes liable for any loss or injury that may be suffered, provided, it happen without negligence or misconduct on the part of the party injured. A

1. Reported with the *Pennsylvania* cases in volume 10.

2. Reported with the *Pennsylvania* cases in volume 10.

carrier of passengers is bound to omit no precaution that may conduce to their safety. He is bound to guard against every apparent danger that may beset them. The dangers incident to travelling in railway cars are few in comparison with those incident to other modes of travel; but the most prominent of them is risk of injury to limbs stuck out of windows, where the cars are not so constructed as to prevent it. Any one who has travelled by railway, must have observed that even the most careful passengers forget the risk, and unconsciously suffer their elbows to slip out beyond the window sill. What can a carrier do to prevent it? No more is required than a few metallic rods set in the windows perpendicularly or horizontally, or a netting of wire work, or even wooden slats. None of these would materially impede the circulation of the air, or abridge the comfort of the passengers, while it would make their safety sure. A car without any of these appliances, is, to coin a phrase, not road-worthy, and a carrier is responsible for any loss that may happen from that cause alone. Risking his passengers in an unsafe car, it behooves him to use every means in his power to guard against danger from it at dangerous places, by audibly proclaiming in the car the necessity of keeping arms and heads inside. Should any one disregard such warning, he would incur the charge of willful neglect of his own safety, and where there is negligence on both sides, neither party is answerable for any injury from it."

We are aware that this last case has been overruled by the case of *The Pittsburg & Connellsville R. R. Co. v. McClurg*, (56 Pa. St. 294). But we think the former case the better considered of the two, and to be based on sounder reasons and more in harmony with the analogies of the law, and entitled to more weight (1).

But even if it were to be conceded that it was negligence on the part of appellee to have had his arm outside of the car window, should he be precluded from a recovery? Was it negligence on the part of the railway company to permit cars or other heavy or permanent bodies to stand so near their track, that cars in motion must pass within a few inches of such bodies? We suppose it to be the clear and undeniable duty of a railway company to keep its track clear of such obstructions; and a failure to do so, is gross negligence. With such objects so nearly in contact with cars running at a high rate of speed, life must necessarily be greatly endangered; and when such negligence as appellee may have been guilty of, is com-

1. Reported with the *Pennsylvania* cases in volume 10.

pared with the negligence of permitting a freight train to stand so near the track of a passenger train as to produce the injury which did occur, the former is slight and the latter is gross. And it has long been the settled law of this court, in such cases, to compare the negligence of both parties, and even if the plaintiff is guilty of negligence which is slight, as compared with that of the defendant, he may recover. *Galena & Chicago Union R. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago & Rock Island R. R. Co. v. Still*, 19 Ill. 499; *St. Louis & Alton R. R. Co. v. Todd*, 36 Ill. 409; *Chicago & Alton R. R. Co. v. Hogarth*, 38 Ill. 370. These cases, besides a large number of others in our court, announce the rule, and notwithstanding other courts have adopted and acted upon a different rule, we regard it as firmly established in this State.

But even under the contrary rule there are authorities of weight which would justify us in holding that the protrusion of appellee's hand through the car window was not negligence, and that permitting the freight cars to stand so near the track for the passenger cars was gross negligence. In the case of *Spencer v. Milwaukee & Prairie du Chien R. R. Co.*, 17 Wis. 493, it was held, where a passenger, while the train was passing over a bridge, had his hand outside of the car window, and it came in contact with a brace in the bridge, which had become loosened and dropped downward, and the hand was injured, there was not negligence on the part of the plaintiff, while there was on the part of the company.

An examination of the instructions given in this case, shows that the rules announced and applied by this court in reference to negligence, were fairly stated to the jury, and could not have misled them; and the evidence sustains the verdict.

The verdict found and returned by the jury was, no doubt, excessive, but the court below required appellee to remit all but \$2,500, or he would grant a new trial. This appellee did, and the court rendered judgment for that sum. While the verdict, after the *remittitur* was entered, was still large, we are not prepared to say that it is so far excessive as to require the judgment to be reversed. It is not so large as to strike us that it could only be the result of passion, prejudice or mistake.

The judgment of the court below is affirmed.

CHICAGO CITY RAILWAY COMPANY v. ROOD.

Supreme Court, Illinois, November, 1896.

[Reported in 163 Ill. 477.]

PASSENGER ON CABLE CAR STRUCK BY PASSING WAGON—INSTRUCTIONS.—In an action to recover damages for injuries sustained by a passenger on one of defendant's cable cars it appeared that plaintiff was reading a newspaper while riding in an open car, and was struck and injured by a wagon as it passed by the car. On the trial the court instructed the jury to the effect that if plaintiff proved due care at the time of the accident there was a presumption of negligence on the part of defendant, and the burden was upon defendant to prove that it was not negligent. On appeal it was *held* that the instructions were erroneous, the rule, under the facts of the case, being stated too broadly.

PRESUMPTION OF NEGLIGENCE.—Where the accident is one which would not in all probability happen if the person causing it was using due care, or the instrumentality causing the accident is solely under the management of the defendant, then the occurrence of the accident, together with proof of the exercise of due care on the part of the plaintiff, is sufficient *prima facie* proof of negligence to impose upon defendant the *onus* of rebutting it.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook County. *Judgment reversed.*

"This was an action by appellee, Rood, against the appellant company, to recover damages for a personal injury. The declaration contains four special counts, the first three of which charge negligence on the part of appellant's servants in the operation of the car of appellant upon which appellee was riding at the time he was injured. The fourth count charges negligence in the construction and equipment of the car. The trial resulted in a verdict for \$4,500 in favor of appellee. Appellee remitted \$2,000, and motion for a new trial was overruled, and judgment rendered for the balance, \$2,500.

"This judgment has been affirmed by the appellate court, and the present appeal is prosecuted from such judgment of affirmance.

"The material facts are substantially as follows: About nine o'clock on the morning of August 26, 1892, appellee boarded the grip car of a train of cars of appellant, operated by the cable system upon Cottage Grove avenue, Twenty-second street and Wabash avenue in Chicago. Appellee boarded the car at the corner of Twenty-fifth street and Cottage Grove avenue. The train was go-

ing north on Wabash avenue upon the east track, the cars going south being upon the west track of the road. Appellee sat on the second seat from the front at the outer end of the seat facing the front of the car. After taking his seat, he took out his newspaper and commenced reading. He placed his arm around the upright, or post, supporting the roof of the car, holding his newspaper before his eyes. He was on the west side of the car, which was an open one; the lower part of his right leg was laid across the left foot below the knee; his right foot extended beyond his left, and beyond the edge of the floor, about six inches, and his left foot rested on the edge of the floor. While in this position, with his arm around the post and his legs crossed and foot extended in the manner stated, some object, which the testimony tends to show to have been a large wagon carrying coal, brushed past his arm, and, as the team passed going southward, part of the harness struck his foot and pulled it back drawing him partly out of the seat; his left leg was bruised by coming in contact with the iron side or arm of the seat; his body was pulled out of the seat, and by catching hold of the back of the seat in front of him and holding on to the upright or post with his hand, he was partially turned around sideways. The accident occurred near the corner of Twelfth street and Wabash avenue, where the thoroughfare was quite crowded. Appellee did not see the team or wagon before it struck him, but saw, as he turned around, a coal wagon or a heavy wagon of that nature, about the length of a car or two cars, going south. Appellee states, that the wagon was drawn by two horses to the best of his recollection. The car was not stopped, nor was its motion slackened at the time of the accident; but it was going at the regular gait at which the cars travel on Wabash avenue. Plaintiff had been in the habit of riding on appellant's cars frequently, and was aware that Wabash avenue was a crowded thoroughfare.

"On behalf of the plaintiff, the trial judge gave, among others, the following instructions to the jury:

"The court instructs the jury, that, if they believe from the evidence in this case, that the plaintiff, Rood, on August 26, 1892, boarded the cable car of the defendant at or about Twenty-fifth street in this city on his way down town, and paid the price of transportation, to wit, five cents; and that, while riding as a passenger and observing ordinary care for his personal safety, plaintiff's foot was brought in contact with a horse, harness or wagon passing or standing at or near the tracks of defendant, along which said cable car was being operated by defendant's servants; then to

avoid liability for such injuries, the defendant must prove by a preponderance of the evidence, that its servants exercised the highest degree of care for the personal safety of the plaintiff in the operation of said cable car at the time said injuries were inflicted."

"The court instructs the jury, that, if they believe from the evidence that on August 26, 1892, the plaintiff in this case became a passenger and paid his fare for transportation upon one of defendant's Wabash avenue cable cars, and that, while so riding as such passenger and observing ordinary care for his personal safety, his foot and leg were injured by being brought in contact with something standing or passing near the tracks of defendant, upon which said car was being operated by defendant's servants; then it is for the defendant to explain how said injury occurred, and to show by a preponderance of the evidence, that the alleged injuries of plaintiff were not the result of any lack or failure to exercise the highest degree of care and diligence on the part of its servants in the operation of said cable car."

WILLIAM J. HYNES and H. H. MARTIN, for appellant.

MANN, HAYES & MILLER, for appellee.

Magruder, Ch. J. — By the giving of the instructions set out in the statement preceding this opinion, the court submitted the case to the jury upon the theory, that, if the appellee proved that he was in the exercise of ordinary care at the time of the accident, there was a presumption that appellant was guilty of negligence, and accordingly that the appellant had the burden of proving by a preponderance of evidence, that it was not negligent. The question presented for our consideration is, whether, in case of the happening of an accident to a passenger upon a street car, the two concurrent facts of the accident and the exercise of ordinary care by the injured party raise a presumption of negligence against the carrier, so as to shift the burden of proof upon it to show that it was not guilty of negligence.

The weight of authority seems to be in favor of the position, that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier. The rule is thus stated by Booth in his work on Street Railway Law (sec. 361): "The mere fact, that a passenger has been injured *en route* without any evidence whatever as to the manner in which the accident occurred, does not raise a presumption of negligence against either of the parties, but the burden of proof shifts where the accident proceeds from an act of such a character that, when due care is

taken in its performance, no injury ordinarily ensues from it, or where it is caused by the mismanagement of a thing over which the defendant has immediate control, or for the management or construction of which it is responsible." Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows, that the accident was due to a cause beyond the control of the carrier, as the presence of *vis major*, or the tortious act of a stranger tending to produce the accident, no such *prima facie* case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. The presumption in question comes from the nature of the accident, and the circumstances surrounding it, rather than from the mere fact of the accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances, surrounding the accident, are such as to indicate, that it would not probably have occurred if the company had been in the use of suitable machinery, or safe apparatus, or if it had employed proper and competent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stage coach, or of the derailment of a car, or of the sudden jerk of a train, or of a blow from part of a passing train, or of a collision between two trains belonging to the same carrier, or of the breaking down of a bridge upon the line of a railway. Bradner on Evidence, pp. 422, 424; Ray on Negligence of Imposed Duties of Passenger Carriers, pp. 690-697; Hutchinson on Carriers, secs. 799-801; Patterson on Railway Accident Law, p. 438; Smith v. St. Paul City R'y Co., 32 Minn. 1; Holbrook v. Utica & Schenectady R. R. Co., 12 N. Y. 236; LeBarron v. East Boston Ferry Co., 11 Allen, 312 (1); Transportation Co. v. Downer, 11 Wall. 129; Stokes v. Saltonstall, 13 Pet. 181 (2); Sterne v. Railway Co., 76 Mich. 591; Wharton on Law of Negligence, sec. 661. It is reasonable, that a presumption of negligence should arise against the carrier in cases

1. Le Barron v. East Boston Ferry Co., 11 Allen, 312, is reported in 3 Am. Neg. Cas. 760.

2. Stokes v. Saltonstall, 13 Pet. 181, is reported in 7 Am. Neg. Cas. 297.

where the cause of the accident is under its control, because it has in its possession the almost exclusive means of knowing what occasioned the injury, and of explaining how it occurred, while the injured party is generally ignorant of the facts. But where the cause of the accident is outside of and beyond any of the instrumentalities under the control of the carrier, its means of knowledge may not be and are not necessarily better than those of the passenger. In the present case, the car in which the appellee was riding was travelling along the public street of a city, which the owners of other vehicles had as much right to use as the owners of the cable cars. Plaintiff's own testimony showed, that he was injured by a wagon travelling along the public street, and passing the car in which he was riding. The accident may have been due, so far as plaintiff's evidence showed, to careless driving on the part of the driver of the wagon. Plaintiff's proof was equally consistent with the absence as with the existence of negligence on the part of appellant. Hutchinson on Carriers, sec. 799. At any rate, such evidence left it doubtful whether appellant was guilty of negligence or not, and the presumption that the accident was unavoidable, was as reasonable as that it was due to appellant's negligence. *Sterne v. Railway Co. supra*. Under such circumstances the nature of the accident was not such as to throw the burden of proof upon the appellant.

In *Federal Street and Pleasant Valley R'y Co. v. Gibson*, 96 Pa. St. 83, a passenger on the car of a street railway company was struck and injured by a passing wagon loaded with hay, while sitting in the street car by an open window, with his left arm resting on the window ledge, it not being shown whether it projected beyond the ledge or not; and it was held by the court, that the approximate cause of the injury, at least in part, was the act of a third party, to wit: the driver of the wagon, over whom the railroad company had no control; and that, under the circumstances, the presumption of negligence on the part of the company did not arise, but that the duty rested on the passenger to prove the negligence of the company. There was there no privity of contract between the company and the driver of the wagon, as there is none in the case at bar. *Hawkins v. Front Street Cable Railway Co.*, 3 Wash. 592; *Saunders v. Chicago & N. W. R'y Co.*, 60 N. W. Rep. 148; *Potts v. C. C. R'y Co.*, 33 Fed. Rep. 610.

The same doctrine announced in the authorities herein before referred to is the doctrine of this court, as will be seen by reference to the following cases: *North Chicago St. R'y Co. v. Cotton*, 140

Ill., 486; N. Y., Chic. & St. Louis R. R. Co., *v.* Blumenthal, 160 Ill. 40; Hart *v.* Washington Park Club, 157 Ill. 9. In North Chicago Street R'y Co. *v.* Cotton, *supra*, the facts showed that the plaintiff at the time he was injured, was a passenger on one of the defendant's street cars run by a cable, and was standing on the rear platform of the car; and while in that position, as he was passing through the LaSalle street tunnel, he was run into by another of the defendant's cars following on the same track, and thereby received the injuries complained of. In that case it will be noticed that the collision was between two cars both of which belonged to the defendant company, and that the collision was not between one of the defendant's cars and a vehicle which was not under the control of the defendant; in that case we said (p. 494): "There seems to be a very general concurrence of authority, that where there was an absence of *vis major*, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury that the defendant acted negligently." In Railroad Co. *v.* Blumenthal, *supra*, it was held, that a *prima facie* case of negligence on the part of the railroad company arises, when a passenger on a freight train, in charge of cattle, is injured by being caught between two cars while he is descending the ladder to look after his cattle during stoppage of the train for water. But, there, the cars and their couplings or bumpers, and the ladder upon which the passenger was descending, belonged to and were under the control of the defendant company; and we said, that a *prima facie* case of negligence was made out in view of the manner and circumstances of the accident, it appearing that the injury to the passenger was caused by apparatus wholly under the control of the carrier, and furnished and applied by it; it was there held that the nature and circumstances of the accident were such as to throw upon the railroad company the burden of proving that the injury was not its fault. In Hart *v.* Washington Park Club, *supra*, we also held, that "the presumption of negligence arises, not exclusively from the fact that the accident happened, but that it happened under given conditions and in connection with certain circumstances." Where the accident is one which would not in all probability happen if the person causing it was using due care, or the instrumentality causing the accident is solely under the management of the defendant, then the occurrence of the accident, together with proof of the exercise of due care on the part of the plaintiff, is sufficient *prima facie* proof of negligence to impose upon the defendant the *onus* of rebutting it.

For the reasons above stated, we think that the instructions given for the plaintiff, in stating the rule without the qualifications herein indicated, stated it too broadly. There was no instruction given for the appellant which cured the error involved in the instructions thus given for the appellee. The jury might well have believed, that the mere fact of the injury did not create a presumption of negligence against the defendant or its agents, and yet may have believed that the fact of the injury, coupled with the exercise of due care by appellee for his personal safety, did create such presumption.

In view of the error herein pointed out, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

QUINN (ADMINISTRATRIX) V. THE ILLINOIS CENTRAL RAILROAD COMPANY.

Supreme Court, Illinois, September Term, 1869.

[Reported in 51 Ill. 495.]

PASSENGER FALLING FROM PLATFORM OF CAR AND KILLED—CONTRIBUTORY NEGLIGENCE.—Where a passenger stood upon the platform of a car, there being standing room in the cars, and a bank note which he tendered to the conductor for payment of fare was carried away by the wind, and in trying to catch it the passenger fell from the platform and was thrown under the cars and killed, the facts showed contributory negligence of the deceased, having voluntarily taken a dangerous position, and verdict for the defendant company was proper, there being no case for the jury.

APPEAL from the Circuit Court of Cook County. *Judgment affirmed.*

MILLER, VAN ARMAN & LEWIS, for appellant.

JOHN N. JEWETT, for appellees.

Lawrence, J.— This suit was brought by the administratrix of Bernard Quinn, deceased, to recover damages for his death. On the trial, the court, after the plaintiff closed his evidence, on motion of the defendant, withdrew it from the consideration of the jury, who thereupon returned a verdict for the defendant.

It appears that the deceased, as one of a large funeral party, had taken passage on the cars of the appellee at Cairo for a point a

few miles distant from that city. The cars were quite full, but the conductor thinks there were unoccupied seats in one of them, and there was standing room in all. The deceased, with several other persons, was standing on the platform when the conductor passed along collecting fares. In making change for a bank note which the deceased paid for his fare, the wind carried away the paper as it was passing from the hand of the conductor to that of the deceased. The latter attempted to regain it, and as he was then standing on the edge of the platform, or on the step, he lost his foothold and fell to the ground. As he fell he struck against the embankment, was thrown back under the cars and killed.

This brief statement of the facts, about which there is no controversy, shows there is no ground whatever for maintaining this action. It was the negligence of the deceased, not that of the railway company, which caused his death. He was chargeable with extreme carelessness, and we can not see on what grounds any material negligence can be attributed to the company. He had voluntarily taken a dangerous position which resulted in his death, and there is no reason why the company should be made to pay damages therefor. Admitting, however, as claimed by appellant's counsel, that the conductor should have advised the deceased to enter the car, at least while paying his fare, his failure to do so was as nothing when compared with the gross negligence of the deceased. The death of the unfortunate man can be attributed only to his own recklessness.

It is urged, however, that this question should have been left to the jury. The practice adopted by the court can not be safely followed in many cases. Whenever there is evidence tending to prove the issue, the plaintiff has a right to take the verdict of a jury. But if this had gone to the jury and they had found for the plaintiff, the court should have set aside their verdict, or, if it had refused to do so, it would have been set aside by this court. As no injustice has been done the plaintiff we can not reverse the judgment.

Judgment affirmed. Rehearing denied.

INJURED WHILE PASSING THROUGH TRAIN.—In *HANNIBAL & ST. JOSEPH R. R. Co. v. MARTIN*, 111 Ill. 219 (1884), an action for damages for injuries sustained by plaintiff while passing through cars of defendant on which she was a passenger. There was a judgment for plaintiff for \$16,000, which was affirmed by the appellate court. Defendant appealed to the Supreme Court. The facts in the case are as follows: Appellee and her husband having procured tickets entitling them to

be carried from Quincy, in this State, to Kansas City, in Missouri, took seats in the waiting room at the Quincy depot some minutes before the time fixed for the departure of appellant's train. She introduced evidence, upon the trial, to the effect that after they had been seated thus for a brief time, the conductor of appellant's train entered the waiting room and publicly announced that appellant's train for Kansas City was ready for departure; that thereupon appellee and her husband, and a number of other persons, arose and proceeded to the train, which was standing alongside the platform used by appellant, and entered the hindmost car in the train; that this car being full, they passed through it, and entered the next car forward, and that car also being full, they then passed through it and into the next forward car, which was also full; that there some man arose and gave appellee a seat, which she accepted, her husband meanwhile being compelled to remain standing; that about the time appellee took the seat thus given her, an employee of appellant entered the car and requested the passengers to be patient for a moment, promising that they would add another car to the train; that soon after this announcement there was the jar forward of one car striking against another, and a moment later an employee of appellant entered the car in which appellee was sitting, through its forward door, and notified the passengers that the car in front was ready; that thereupon some ten or twelve persons passed on and into the car in front, and appellee attempted to also do so, but just as she caught the rail of the forward car, and was in the act of stepping upon the platform of that car, it moved forward, leaving the car from which she was trying to pass, stationary, and by reason thereof she fell or was precipitated to the ground. She was soon after taken up badly injured, and in an insensible condition, and placed in the car in which she had been seated. She remained in the car, and in a brief time became conscious, and continued her journey notwithstanding her injuries. Appellant owns no track or depot in Quincy. Its cars cross the river and enter the depot of the Chicago, Burlington & Quincy R. R. Co. on the tracks of that company, and its trains are made up in Quincy by employees of the Chicago, Burlington and Quincy R. R. Co. The Supreme Court reviewed the instructions of the trial court, which were objected to by the defendant, and other points raised on the appeal, and there being no substantial error, judgment was affirmed. [This case is reported at length in 2 Am. Neg. Cas. 661. See also same case 11 Ill. App. 386, 2 Am. Neg. Cas. 491].

CROWDED PLATFORM OF TRAIN—PASSENGER PUSHED FROM PLATFORM AND STRIKING AGAINST OBSTACLE AT STATION.—In an action to recover damages for injuries sustained by a passenger in being thrown from the platform of a train, plaintiff recovered judgment, which on appeal to

the appellate court was affirmed (1). The case was taken to the Supreme Court and the court (per SCHOLFIELD, CH. J.), in the course of its opinion, said: "The declaration upon which the case was tried contains three counts, in substance as follows: The first alleges that on the 18th of August, 1886, the defendant ran an excursion train between Petersburg and Ashland, and plaintiff became a passenger thereon, and on the return journey defendant negligently permitted the train to become overcrowded, and by reason thereof the plaintiff, while exercising due care, was by the pressure of the persons on the platform and steps of the car unavoidably crowded off and thereby injured. The second count substantially states the same condition of the train and car, and alleges that by reason thereof plaintiff was unable to stand on the platform, and unavoidably fell off, and was thrown against a heavy truck, etc. The third avers the defendant had notice that an unusual number of persons would take the train, and advertised it would carry all persons at reduced rates; that plaintiff became a passenger; that defendant failed to provide adequate room for the passengers, and suffered the train to be overcrowded, and also carelessly permitted a heavy truck to be on the depot platform at Petersburg, directly in the way of persons who might alight from the train, and that by reason of the overloaded condition of the train, the plaintiff, while exercising due care, was thrown from the car and was dragged against the said truck, whereby he was injured. There was a soldiers' reunion on August 18, 1886, at Ashland, on the line of appellant's road. The railroad company sold excursion tickets at reduced rates. The occasion was largely advertised both by the committee of arrangements and the company. Appellee was a resident of Petersburg, the second station north of Ashland, and purchased a return trip excursion ticket. To return the passengers in the evening the regular train going north was used. One extra coach was provided for this train, so that when it left Ashland it

1. In **CHICAGO CITY RAILWAY Co. v. YOUNG**, 62 Ill. 238 (1871), a passenger being compelled to stand on the front platform of one of defendant's street cars, was thrown therefrom by the sudden turning of the brake by the driver, and was killed. Judgment for plaintiff affirmed, the evidence showing defective track and careless handling of brake.

In **NORTH CHICAGO STREET R'y Co. v. COTTON**, 140 Ill. 486 (1892), plaintiff was standing on the platform of a cable car which had stopped half way through a tunnel,

when another car coming through the tunnel collided with the rear car of the train on which plaintiff was travelling and injured plaintiff. Verdict and judgment for plaintiff for \$2,000. On appeal to the appellate court for the First District, plaintiff remitted \$207 from the judgment and the same was affirmed. On appeal to the Supreme Court judgment was affirmed. It was held that the mere fact of the injury raised a presumption of negligence, sufficient to sustain general charge of negligence in running and operation of defendant's cars.

consisted of three passenger coaches, a dining car and a sleeper. The crowd of people returning to Petersburg and other points north was so great that large numbers of them were compelled to stand up in the aisles and upon the platforms of the cars—in fact, the aisles and platforms of most, if not all the cars, except the sleeper and dining car, were completely filled. Appellee occupied a position upon the steps of the forward end of the smoking car, and just as the train reached the south end of the depot platform at Petersburg he was either forced from the train by reason of its crowded condition or voluntarily stepped from it, and coming in contact with a baggage truck, on which a heavy sample trunk was placed, was seriously injured. The jury and two former juries have found that he was involuntarily forced from the train, and that finding has been affirmed by the appellate court, and it must therefore be regarded as a settled fact of the case.” * * * [The court reviewed the instructions but found no reversible error.]

“It is urged that it was error to refuse to take the case away from the jury, by instructing them that under the law and the evidence their verdict should be for the defendant. The contention is, that certain conceded facts occurring at Ashland, and certain conceded and undisputed facts occurring at Tallula, necessarily show that the plaintiff was, on two several occasions, guilty of negligence contributing materially to the injury, and that to this extent the question of his negligence was one of law. In respect to his taking the train at Ashland, on his return trip, plaintiff testified in chief, in substance, as follows: ‘I walked over and got on to one of the steps of the coach, in the front or north end of the coach. There had been a number of people who stationed themselves on the opposite side of the track from the depot and began to climb on from the opposite side, and there was quite a jam there, and it halted me. Probably I was on the second or third step—possibly had one foot on the platform—but at any rate I halted there and looked back over my shoulder and saw a number of lady acquaintances from this place, and I saw by their expression, that they were worried, fearing they were not going to get on, and I thought I would step off and give them the preference, and I did so. I did not get inside the coach, and have no recollection of seeing the inside of it at all. I got off and stood there a moment, and they kept piling on, and I thought it looked a little less crowded up at the other coach, and I walked a car length ahead and got up on the steps of that car. Up to that time I didn’t even see standing room in a coach for me to occupy. Very soon after I got on those steps I crowded myself and looked forward into the car—just about the time the train had started or a minute afterwards—and the people were crowded in that car just as close as it was possible, I think, for people to stand, right up to the door. A moment—very soon—after I got on the steps the train started. I was among the last persons that got on—don’t remember any person passing by me.’ On cross-examination he said: ‘I first got upon the front end of a different coach from that which I finally went upon. I got on to

possibly the edge of the platform with one foot. I don't know whether, if I had seen fit, I could have gone into it or not. There were people behind and before me, and I think I could have crowded in as well as crowding off. That which prevented my going in was that I was crowded by the people and halted by them. Quite a number of people were coming from the opposite side. My best recollection is that I had one foot on the platform and the other one on the steps. I do not know whether the car was crowded or not, as I have no recollection of looking into it. I presume there were more people behind me than before me. I got off the steps to let the ladies get on. So far as the platform and steps of that car were concerned, and the one I went to, there wasn't much difference.'

"We do not understand this testimony of the plaintiff to concede that there was even standing room inside the first car at the time that he left it, or that if he had not left it he would have been able to get inside, or that the ladies in whose behalf he retreated got places inside of the car. Other evidence shows that quite a number of ladies were compelled to ride all the way to Petersburg on the platforms of cars. Appellee got off the steps to let the ladies get on, and all that he gave them was his position on the steps, with possibly one foot on the platform, and he got equally as safe a position on the second car as that which he surrendered on the first. It may be probable that if he had retained his position he might have secured a place inside of the car, but to say he would have done so would be a conclusion of fact for the jury to draw or not to draw, in view of all the evidence. It is not a necessary implication from this testimony that appellee voluntarily and with culpable negligence abandoned a safe place on the train and placed himself in an unsafe one. He did not owe a duty to the railroad company to push and crowd his way in order to get an advantage over other passengers in securing a place within the car, and it does not follow as a matter of law that he was guilty of negligence for not so doing. Nor did his duty to the company require that he should wholly disregard the usual and ordinary courtesies and amenities of life. In fact, we do not understand that it is necessarily, and as a matter of law, negligence to stand aside and allow ladies to occupy the safest and most desirable positions in a public conveyance.

"It is claimed that the conceded and undisputed facts of what transpired at Tallula convict appellee of contributory negligence that, as a matter of law, preclude a recovery. Tallula is a station, and the only one, between Ashland and Petersburg. The facts relied on are, that at that place a number of excursionists—from seventy-five to one hundred left the train, and that according to his own statements appellee made no effort, either at or after leaving that place, to enter any other car. In view of the fact that after the train left Ashland the door of the sleeper was opened and a number of passengers, including some twenty-five of the Tallula excursionists, permitted to enter it; of the fact that some twenty witnesses testify to the crowded condition of the cars, in respect to aisles and

platforms as well as seats, both after and before the train left Tallula, many of them stating that there was no perceptible change in that regard after leaving Tallula; of the fact that the conductor received from appellee his ticket for railroad fare, making no objection and giving no warning on account of the place he was occupying, and that appellee had no notice from the conductor or any employee on the train, or other person, that he might find room in some other car; of the fact that the train stopped at Tallula but a very short space of time; of the difficulty and danger, if not impossibility, from the crowded condition of the train, of reaching the rear cars, and of the uncertainty of finding any place inside any of the cars if reached, we are of opinion that negligence could not be imputed to appellee as a matter of law, and that the trial court did not err in submitting to the jury, as a question of fact, whether or not appellee, in retaining his position on the platform and steps of the car where he was, under the circumstances in which he was placed, was in the exercise of ordinary care.

"Appellant's theory of the case was fully and fairly presented to the jury in some thirty instructions. There are some technical inaccuracies in a few of the instructions that were given; but we find no just and substantial ground in any of them for reversing the judgment. It may, however, perhaps not be improper for us to say that we would be much better satisfied with the judgment if the damages had been assessed at a very considerably less amount than they were, and that it is likely that if it was a matter which the law gave us a right to control we would be inclined to hold the damages are excessive; but as we have frequently heretofore held, we have no lawful authority to review the decisions of the lower courts in that behalf. The judgment of the appellate court is affirmed." MARSH & MCFADON, appeared for appellant; EWING & HAMILTON, for appellee. Opinion by SCHOLFIELD, CH. J. *Supreme Court, Illinois, May, 1892. Chicago & Alton Railroad Company v. Fisher*, 141 Ill. 614, aff'g 38 Ill. App. 33.

CHICAGO AND ALTON RAILROAD COMPANY v. WILSON.

Supreme Court, Illinois, January Term, 1872.

[Reported in 63 Ill. 167.]

PASSENGER STRUCK BY TRAIN AT STATION PLATFORM—GROSS NEGLIGENCE.—In an action to recover damages for injuries sustained by plaintiff, a passenger, it appeared that plaintiff was standing on a platform at a station when he was struck by a train and injured. The platform was constructed between the main and a switch track, about 100 feet long and 5½ feet wide, and when trains stood side by side there was only about 2 feet 4 inches clear space in the middle of the platform. Plaintiff was not aware that trains passed each other

at this place, being unfamiliar with the locality. *Held*, that the construction of such a platform was gross negligence, and that it was a wanton disregard of human life to run a train on the main track whilst persons were getting upon and from a train on the side track.

ACTIONS AND APPROACHES THERETO.—Railroad companies are required to use all reasonable precautions for the safety of the travelling public, whether in the construction and operation of their engines and coaches, or the erection of their depots, the construction of their tracks or the approaches to their trains. It is the duty of such companies to furnish safe and convenient approaches to their passenger coaches.

APPEAL from the Circuit Court of McLean County. *Judgment affirmed.*

Action on the case by David Wilson, against appellant, for a personal injury from a train of appellant's cars, whereby he lost his right hand. The declaration charged that the accident was caused by the negligent and insufficient manner in which the platform was built. Trial and verdict for \$14,000. Motion for new trial, which was granted. At the second trial the verdict was for \$8,000. Motion for new trial, which was overruled.

WILLIAMS & BURR, for appellant.

GEO. H. ESTABROOK and **WELDON & BENJAMIN**, for appellee.

Walker, J.—This was an action on the case brought by appellee, to the McLean Circuit Court, against appellant, to recover for injuries inflicted on the person of appellee. On the 29th of October, 1869, appellee was, whilst standing on a platform at the station at Lexington, struck by a train of cars. The platform had been constructed by appellant for the convenience of passengers in approaching and leaving the trains on appellant's road, and was situated between the main track and a switch track. The platform was also used by the road in taking care of baggage, mail and express matter received and discharged at that station. At the time the accident occurred the passenger trains passed each other at that station, and such had been the case for some weeks previously. The platform was about 100 feet in length and 5 feet 4 inches in width. The time for the arrival of the trains was the same. In passing where the train coming from the north reached the south end of the switch, it was opened and the train ran in and stopped opposite the depot; and after receiving passengers, baggage and mails, it passed out of the switch and went south.

Appellee, after purchasing a ticket for the train going south, with a friend passed over the main track to the platform for the purpose of passing to the train which was approaching, and whilst either

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standing or walking slowly on the platform, was struck and injured by the train coming from the south. When the trains stood side by side of each other there was between the coaches about 2 feet 4 inches of clear space in the middle of the platform, the projection of the coaches covering about 18 inches on each side. Appellee was not familiar with the locality, this being the first time he was ever there, nor was he aware that the trains passed each other at that place. When struck, appellee was waiting for the passengers to alight from the train upon which he expected to take passage, and his back was towards the approaching train.

The company had provided no other means of leaving and approaching their passenger trains on the side track than by this platform, and persons desiring to go south had no other access from the depot building except by approaching it over this narrow platform. It does not seem that there was in practice any regularity in the mode of passing; sometimes one would pass out first, at other times the other, and on other occasions both would pass out at the same time.

After receiving the injury appellee was taken to a hotel close by, and his right hand being badly mangled it was amputated. For some days his life was believed to be in danger. He was unable to attend to his business for about six months after receiving the injury, and expended, as the evidence shows, about \$1,000 in paying physicians' bills, medicines, board and nurses. His occupation is that of a teacher of music, and the proof tends to show that he earned about \$200 per month, and that he is less successful since his injury; and he is under the necessity of hiring an assistant. These are the material facts developed on the trial. The case was twice tried by the court and a jury, the first trial resulting in a verdict of \$14,000; the latter in \$8,000, upon which judgment was rendered.

Railroad companies are required to use all reasonable precautions for the safety of the travelling public, whether in the construction and operation of their engines and coaches, or the erection of their depots, the construction of their tracks or the approaches to their trains. In operating such immense forces, it is their duty to use them with care and with regard to the safety and rights of other persons. And neglect in furnishing any of the appliances to their roads, or, when furnished, if insecure and unsafe, when it could have been avoided by reasonable effort and precaution, if injury results the company will be held liable for damages resulting therefrom. It is the duty of such companies to furnish safe and con-

ent approaches to their passenger coaches. They have no right to invite the travelling public to occupy positions of peril. In this case we see that this platform was constructed by the company to enable passengers to get upon and pass from their coaches. All persons seeing it would understand that this was its principal use, and would use it for the purpose without being informed that such was its purpose.

When, was reasonable care observed in the construction of this platform? We think not; but, on the contrary, that those planning and executing the work were guilty of reckless and wanton carelessness. To erect such a structure, having but little more than the width of a man clear between the passing cars, is almost what was a witness denominated a "first-class man trap." The most ordinary intellect would only have to see it to understand that it would be highly perilous to the safety of passengers going on and from the train. When built it was, from its very character, dangerous when used as a point for trains to pass each other. The fact that when so used it was highly dangerous would seem to be a self-evident proposition. It was so manifest that persons not connected with the road had previously called the attention of the employees of the company to the danger, but it had not been heeded. It, when all the facts are considered, appears to have been reckless to create so dangerous a platform, and gross negligence to use it as the company did.

Again, knowing, as the engine driver and conductor did, the situation of this platform, it was a wanton disregard of human life to run the train on the main track opposite that on the side track, so that persons were getting upon and from the other train, and were necessarily using the platform. No one could have ever reasonably hoped that it could be done without inflicting injury upon some one. The last train should have waited till all persons had descended from the standing train and all persons going as passengers had got aboard, and the platform was clear, before drawing up to the depot. In doing otherwise there was the largest degree of negligence, amounting to willful injury upon appellee. The injury was almost the inevitable result of such management of the trains. And when the company subsequently changed the track, they only showed what a reasonable regard for the safety of others required them to have done before the accident occurred; or they should have at least so constructed it.

Nor can it be said that appellee was wanting in care on his part. He came to the depot a stranger; he found the platform; knowing its use, he went on it with an implied assurance that it was safe

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and that he might use it for approaching and getting upon the train standing there to receive passengers. What reason had he to suppose that to save himself he would have to occupy the precise center of the platform or lean against the cars on the side track? He was not informed by the employees of the company, or any one else, that the other train would come up before the one on the side track would leave; he had no reason to suppose that so dangerous an act would be done by the company. It may have been obvious to him that his situation would be perilous if the other train should run up, as it did, on the main track, but why should he even imagine that so reckless a thing would be done? He had a right to believe that the employees of the company would act with common prudence. This the law, as well as common feelings of humanity, required at their hands.

Nor do we see that, even if he did say that he "did not know that any one was to blame," the company was excused by that declaration.

When he used the language, if he did, he was under the influence of pain, perhaps of narcotics, and his mind confused if not unsettled by the effects of the injury. But even if he made the declaration deliberately, the fault of the company is so apparent that such a declaration could not create the slightest doubt that he was wholly mistaken. We can see no negligence on the part of appellee, and negligence gross and reckless on the part of appellant, and it is certainly liable for the results of that want of care.

We now come to consider the question whether the damages are so far excessive as to require a reversal. Whilst they are high, were it not for the fact that there was such gross negligence on the part of the employees of the company, this verdict would probably have been excessive. When the company neglected to make the change of their track when their attention was called to the danger it involved, it indicated such recklessness as authorized punitive damages. When appellee had lost his hand, had been rendered thereby incapable of performing on a musical instrument necessary to his musical performances, and being compelled to employ an assistant at a large expense, to pursue his business, and having to submit to greatly reduced income, and having been compelled to lose a large sum whilst being cured, and being at large expense in board and physicians' bills, he was entitled to a large portion of this sum as mere compensation, and the amount allowed as punitive damages is not excessive.

Perceiving no error in this record, the judgment is affirmed.

Among other actions in the Illinois Supreme Court, relating to Persons Injured on Trains, etc., are the following:

Riding on free pass:—

ILLINOIS CENTRAL R. R. CO. v. READ, 37 Ill. 484 (1865), an action for damages sustained by plaintiff while riding on defendant's train on a free railroad pass. The accident was found to be due to reckless conduct of conductor. Judgment for plaintiff. On appeal defendant argued special contract relieved them from liability. For unavoidable accidents it was held the company would not be liable under the contract, but it was not exempt for injuries resulting from gross negligence of employees. For error in sustaining demurrer to defendant's fifth plea, namely, release of damages for valuable consideration paid by defendant to plaintiff, judgment reversed. [The doctrine in this case as to liability for injuries to persons travelling on a pass is applied in *Toledo, W. & W. R'y Co. v. Beggs*, 85 Ill. 80, 9 Am. Neg. Cas. 227 *ante*.]

In **ILLINOIS CENTRAL RAILROAD COMPANY v. O'KEEFE**, 154 Ill. 508 (1895), plaintiff's intestate, who was riding on a free pass, was killed in a collision with a freight train. It appeared that he had boarded the baggage car and was sitting on the steps of that car when the collision occurred, and that none of the passenger cars were injured in the accident. On the trial, in the Circuit Court of Union county, there was a verdict and judgment for plaintiff for \$2,280, which on appeal to the Appellate Court for the Fourth District was affirmed. An appeal was taken to the Supreme Court, errors being assigned, first, because of refusing to consider the evidence because of no motion for new trial being incorporated in the record; second, in refusing to allow appellant to file an amended record; third, in refusing to grant a rehearing; fourth, in refusing to consider the question as to whether the court gave improper instructions for plaintiff; fifth, in refusing to consider whether the court refused to give proper instructions asked by the defendant; and, sixth, in affirming the judgment of the Circuit Court. The Supreme Court held that it was the duty of the Appellate Court to determine the correctness of the instructions given and refused on the trial, and that there was error in the trial court giving an instruction stating as a proposition of law that it was not negligence for the deceased to ride on the steps or platform of the car, as that was for the jury to determine from the facts of the case. Judgment reversed and case remanded for a new trial.

Injuries to Stockmen:—

In **LAKE SHORE AND MICHIGAN SOUTHERN R. R. Co. v. BROWN**, 123 Ill. 162 (1887), it appeared that plaintiff's intestate, a stockman, was killed by being thrown from the footboard of a transfer engine while in charge of stock. The accident was caused by careless running of engine. Plaintiff recovered \$5,000 damages, which was affirmed by the Appellate Court for the First District, and on appeal to the Supreme Court was affirmed.

CHICAGO, BURLINGTON AND QUINCY R. R. Co. v. DICKSON, 143 Ill. 368 (1892), was an action for damages for injury to a stockman due to a collision between his train and another, which caused the car in which plaintiff was riding to be thrown from the track, inflicting injuries upon plaintiff. Judgment for plaintiff affirmed in the Appellate and Supreme Courts.

CHICAGO AND ALTON R. R. Co. v. RAYBURN, 153 Ill. 290 (1894), was an action for damages for injuries sustained by a stockman by being struck by a train as he was passing along the track to his car in obedience to instructions from defendant's servants. On the trial there was judgment for plaintiff for \$2,000, which was affirmed by the Appellate Court for the Third District. On appeal to the Supreme Court judgment was reversed on the ground of erroneous instructions, viz: That "plaintiff was rightfully on the space between defendant's tracks," when that question was in controversy, and authorizing a finding against defendant on negligence not charged in the declaration.

IN NEW YORK, CHICAGO AND ST. LOUIS R. R. Co. v. BLUMENTHAL, 160 Ill. 40 (1896), it appeared that plaintiff, a stockman, was injured while descending from the top of a car after inspecting the cattle, due to sudden start of train. Judgment for plaintiff affirmed in the Appellate Court for the First District and the Supreme Court.

Trespassers Injured:—

NORTHWESTERN R. R. Co. v. HACK, 66 Ill. 233 (1872), was an action for damages for death of boy who fell or was kicked from steps of moving car. The evidence tended to show that one of the defendant's servants kicked the hand of the boy and thus caused him to jump off the train. Verdict and judgment for plaintiff. On appeal judgment affirmed.

IN TOLEDO, WABASH & WESTERN R'y Co. v. BROOKS, Adm'x, 81 Ill. 245 (1876), action to recover damages for causing death of plaintiff's husband while travelling on defendant's train, he not having paid fare, it was held that if a person stealthily, and without knowledge of employees of a railroad company, gets upon a train and secretes himself for the purpose of passing from one place to another, he cannot recover if injured. Nor is a company liable where a person fraudulently induces a conductor to violate a rule of the company whereby the company is defrauded out of the fare. Judgment for plaintiff for \$3,166 reversed.

IN TOLEDO, WABASH & WESTERN R'y Co. v. BROOKS, 81 Ill. 292 (1876), the questions discussed in the case between the same parties in the preceding paragraph noted were presented and similarly disposed of. Judgment for plaintiff reversed.

A similar point to the Brooks case (above noted) was decided as in that case in **CHICAGO & ALTON R. R. Co. v. MICHIE**, 83 Ill. 427 (1876), an action for damages for death of a person in a collision, the deceased having boarded an engine against the rules of the company and to avoid paying fare. Judgment for plaintiff reversed.

WEST CHICAGO STREET RAILROAD COMPANY v. NASH.

Appellate Courts, Illinois, First District, March Term, 1896.

[Reported in 64 Ill. App. 548.]

PASSENGER FALLING OVER SACHEL IN STREET CAR.—
There a passenger boarded a street car in making her way through the car to find a seat, the car suddenly started and plaintiff fell over a satchel in the aisle of the car and was injured, the defendant was held liable (1).

ACTION by Margaret Nash to recover damages for personal injury alleged to have been received through the negligence of the Chicago Street Railroad Company. *Judgment affirmed.*

Among other actions relating to persons Injured on Trains, etc., see following:

LOUISVILLE, NEW ALBANY AND CINCINNATI RAILWAY CO. v. STOUT, 114 Ill. App. 298 (1896), an action for damages for injuries received while plaintiff was on defendant's train, it appeared that plaintiff was standing on the station platform in the depot at Chicago when the train arrived with friends when the train started, and as the train was moving plaintiff stepped upon and into the sleeping coach, which was in the rear of the day coach in which he intended to ride. Passing through the coach and across the platform coming out with the car ahead, he fell through the door of that car. A lady was following him, and at the moment of opening the door he fell over her. He then stepped back and permitted her to pass into the car in front of him, and as he did so his right foot and leg, up to his knee, fell down into a space between the ends of the two cars. On the trial the plaintiff recovered verdict and judgment for \$500. On appeal judgment was reversed, it being held that plaintiff did not exercise proper care,

having voluntarily left a place of safety without looking as he stepped backward, and that the defendant was free from negligence.

In **LAVIS v. WISCONSIN CENTRAL R. R. CO.**, 54 Ill. App. 636 (1894), it appeared that plaintiff, while a passenger on defendant's train, was proceeding to the water-closet at the end of the car, when the train gave a sudden lurch and he was thrown out of the door to the ground and seriously injured. The trial court gave a peremptory instruction that plaintiff could not recover. Held, on appeal, that such an instruction was error, as the relation of passenger and carrier, the accident, without fault on part of plaintiff, by a sudden lurch of the car, and the injury were shown, and a *prima facie* case of negligence on part of defendant, was made out. Judgment reversed and cause remanded.

In **EAST ST. LOUIS ELECTRIC STREET RY CO. v. STEGER**, 65 Ill. App. 312 (1896), judgment for plaintiff for \$750, for injuries alleged to have been sustained by her through a shock of electricity while a passenger on defendant's electric car, was

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"The declaration, which consists of three counts, alleges, first, that the defendant failed to operate its certain grip car, in which the plaintiff was a passenger, in a safe and steady manner, and to give the plaintiff an opportunity to be seated, but before the plaintiff could reach a seat the defendant's servants suddenly started the car, thereby throwing the plaintiff to the floor; second, that the defendant failed to perform its duty to keep the aisles or passage way in the car free from satchels, parcels or other obstructions, in consequence of which the plaintiff, on her way to a seat in the car, stumbled and fell over a satchel, parcel or other obstruction; the third count is merely a combination of the other two.

"The plaintiff claims to have sustained a fracture of her left arm and other wounds and bruises, which have caused her great pain and prevented attendance upon her usual business and affairs.

"The evidence shows that on the morning of November 7, 1892, the plaintiff took passage on one of the defendant's Madison street

reversed, the evidence not sustaining the allegations of negligence, the car being in perfect order, and a metallic plate being charged with electricity, due to damp weather, causing the alleged shock for which defendant was not liable.

Derailement.—*ST. LOUIS COAL R. R. Co. v. MOORE*, 14 Ill. App. 510 (1884), was an appeal from judgment for plaintiff who was injured by the overturning of the car on which he was riding as a passenger, the accident being due to alleged defective track. Judgment reversed on ground of error in giving instruction implying that the railway company was an insurer of passengers.

MOBILE & OHIO RAILROAD Co. v. KLEIN, 43 Ill. App. 63 (1890), was an action for damages for injuries alleged to have been sustained by a passenger in jumping from a car that had become detached from the main train and was derailed. On the trial in the Circuit Court, St. Clair county, there was a verdict and judgment for plaintiff for \$1,400. On appeal judgment was reversed on the ground of erroneous instructions in

placing the right of recovery on the sole ground of there being an accident and that plaintiff jumped from the car and was injured, regardless of the question whether defendant was negligent or whether plaintiff was in the exercise of due care and acted as a man of ordinary prudence would under the circumstances. [Citing *Tuller v. Talbot*, 23 Ill. 357, 9 Am. Neg. Cas. 207, *ante*; *Heazle v. Ind. B. & W. R'y Co.*, 76 Ill. 501, 9 Am. Neg. Cas. 227, *ante*.]

Riding on pass.—In *JACKSONVILLE SOUTHEASTERN RAILWAY COMPANY v. SOUTHWORTH*, 32 Ill. App. 30 (1889), it appeared that plaintiff while riding on a free pass, was injured by the train being derailed. The evidence showed the tracks to be defective. Verdict and judgment for plaintiff in the Montgomery Circuit Court for \$6,500. On appeal the court held that the evidence fully warranted the jury in finding that defendant's servants were guilty of gross negligence, and it was upon the theory that gross negligence alone would warrant a recovery that the case was tried and instructed.

EGBERT JAMIESON and JOHN A. ROSE, for appellant.
W. D. MUNHALL, for appellee.

By mistake of the clerk there was an omission in entering the judgment. The railway company appealed to the Supreme Court where judgment of the Appellate Court was reversed, for failure to show necessary findings of fact as required by law. The Appellate Court again considered the case and arrived at the same conclusion as heretofore. Ill. App. 327. Judgment of the Appellate Court reversed. CHICAGO, BURLINGTON & NORTHERN R. R. Co. v. MORGAN, 42 Ill. App. 322 (1889).

ILLINOIS CENTRAL RAILROAD CO.
v. BEEBE, 69 Ill. App. 363 (1896),
was an action for damages for death
of plaintiff's intestate due to alleged
negligence of railroad company. The
deceased was in charge of a car load
of his horses and household goods,
his contract giving him free transpor-
tation while in charge of the stock.
During the journey, as the train was
making a crossing, the passenger fell
or was thrown out of the car in which
he was riding and sustained injuries
from which he shortly afterwards
died. The negligence charged was
unusual violence of bumping and
jerking of car and sudden starting of
same without warning, as it was
making the crossing. On the trial
there was a verdict and judgment for
plaintiff for \$5,000. On appeal judg-
ment was affirmed.

AWK, 42 Ill. App. 322 (1889).

Waterman, J.— Only a question of fact is involved in this appeal. Appellant was bound to exercise the highest degree of diligence for the safety of appellee, who was a passenger.

We find in the record no sufficient reason for reversing the conclusion of the Circuit Court, and its judgment is affirmed.

WEST CHICAGO STREET RAILROAD COMPANY v. STEPHENS.

Appellate Courts, Illinois, First District, March Term, 1896.

[Reported in 66 Ill. App. 303.]

PASSENGER THROWN OVER DASHBOARD OF CAR—OBSTRUCTION ON TRACK.—Where plaintiff boarded one of defendant's street cars, and there being no vacant seat stood in the alley between the seats, behind the gripman, and a few feet back from the dashboard of the car, and while the car was going at full speed it ran against an iron manhole cover which protruded above and between the tracks, and plaintiff was thrown over the dashboard and to the ground, the defendant was held liable and judgment for plaintiff affirmed (1).

APPEAL by defendant. The facts are stated in the opinion. *Judgment affirmed.*

EGBERT JAMIESON and JOHN A. ROSE, for appellant.

RITCHIE, ESHER & WOOLLEY and W. H. DICKSON, for appellee.

1. *Among other actions relating to Persons Injured while Riding upon Platforms of Trains, etc., are the following:*

CHICAGO, BURLINGTON & QUINCY R. R. Co. v. COLWELL, Adm'x, 3 Ill. App. 545 (1878), was an action for damages for the negligent killing of plaintiff's intestate, who while temporarily standing on the platform of a car was thrown off by a sudden jerk of the train. Trial in the Circuit Court of La Salle county resulted in judgment for plaintiff for \$3,500. On appeal judgment was reversed on the ground of erroneous instruction in ignoring question of whether plaintiff's intestate exercised due care in going upon a prohibited part of the car in the first instance.

CHICAGO & NORTHWESTERN R'y Co. v. CARROLL, 5 Ill. App. 201 (1879), was an action for injuries sustained by plaintiff while riding upon platform of a train of defendant due to alleged sudden jerk of train, whereby plaintiff was thrown from platform. Trial in Circuit Court of Cook county resulted in judgment for plaintiff for \$4,750. On appeal judgment reversed for error in giving and refusing instructions. The rule as to the duty of railway companies in furnishing cars for passengers as stated in *Quinn v. Ill. Cent. R. R. Co.*, 51 Ill. 495, 9 Am. Neg. Cas. 246, *ante*, followed. It was held that if plaintiff could have avoided the injury by entering the cars at any time immediately preceding the accident,

Shepard, J. — This appeal is prosecuted from a judgment for \$4,150, entered upon a verdict for that sum, in an action by appellee to recover damages for personal injuries alleged to have been sustained by him through the negligence of appellant. A former trial resulted in a verdict for \$4,150.

The appellee was a passenger on board of one of appellant's combination grip and passenger cars, containing open seats in the front where the grip is operated, and, there being no vacant seat, he stood in the alley, between the seats, behind the gripman, and a few feet back from the dashboard of the car.

The car when going at full speed—testified by appellee and not contradicted, at twelve miles an hour—was suddenly stopped by running into an iron manhole cover, which had gotten out of place and

the evidence showing that he had no knowledge that there was room, he was bound to occupy the same.

LAMMERT v. CHICAGO & ALTON R. Co., 9 Ill. App. 388 (1881), it appeared that plaintiff, a boy, ten years of age and deaf and dumb, was injured while falling from an engine which he boarded by alleged invitation of defendant's employees. Judgment for defendant. On appeal, judgment was reversed, it being held that where a child of the age and condition of plaintiff boarded the engine by invitation of defendant's employees, and was injured by their negligence, the company cannot escape liability, on the ground that he was there without the permission of the company.

CHICAGO WEST DIVISION R'y v. KLAUBER, 9 Ill. App. 613 (1881), plaintiff was standing upon the platform of the car and was injured by the car leaving the track on the bridge. He recovered judgment for \$1,000. On appeal judgment reversed. The fact that the conductor knew plaintiff was occupying a dangerous position, or that it was customary for others to do so, would not relieve plaintiff from the charge of contributory negligence, and an instruction to the contrary effect is

erroneous. The question whether plaintiff exercised due care, under the circumstances, was for jury to determine.

CHICAGO & NORTHWESTERN R'y Co. v. RIELLY, Adm'x, 40 Ill. App. 416 (1890), was an action for damages for death of plaintiff's intestate, who was killed in a collision while a passenger on defendant's train. The deceased was riding upon the coping or footboard attached to the rear end of the tender, although there were seats in the car. Judgment for plaintiff reversed on the ground of contributory negligence.

ST. LOUIS, ALTON & TERRE HAUTE R. R. Co. v. CARR, Adm'x, 47 Ill. App. 353 (1892), was an action for damages for death of plaintiff's intestate, who, while in a state of intoxication, fell off the train while it was in motion and was killed. Judgment for plaintiff for \$5,000. On appeal it was held that if the defendant knew of the passenger's condition, and permitted him to remain on the steps of a car, it would be liable, but defendant was not bound to protect passengers from their own negligence; and in case of intoxicated persons was not bound to place guards over them to prevent

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protruded above and between the tracks, and the appellee was thrown over the dashboard and to the ground.

The only evidence introduced or offered on the part of the defense was directed to the single question of the extent of the injury suffered by appellee.

Even though we did not regard the evidence as greatly preponderating in favor of the conclusion that appellee's injuries were severe at the time and serious in effect upon him, we should be required to hesitate long before reversing the judgment on account of excessive damages where two so nearly equal verdicts, upon conflicting evidence, had been returned for substantial damages.

Complaint is made of the refusal by the trial court to give nine of the instructions asked by the appellant.

All of such instructions as proceeded upon the theory that the manhole covering in question had been broken by one of the city

them from getting in places of danger while on the train. The facts did not show negligence on defendant's part. Judgment reversed.

In *OHIO & MISSISSIPPI R'Y Co. v. ALLENDER*, 47 Ill. App. 484 (1893), it appeared that plaintiff boarded the front platform of the express car of a train, the door of which was locked, and while trying to get in the car fell off or was thrown from the platform as the train was rounding a curve, and was seriously injured. On the trial he recovered a judgment, but, on appeal, this was reversed, it being held that he took upon himself the risk of so boarding, he knowing that the express car was in the exclusive control of the express messenger, and that the railroad company had no legal right to see that the door was unlocked.

On the second trial of this action plaintiff recovered \$1,000 damages, but on appeal this was reversed, the court adhering to its former opinion. *OHIO & MISSISSIPPI R'Y Co. v. ALLENDER*, 59 Ill. App. 620 (1895).

In *CHICAGO & ALTON R. R. Co. v. DUMPSER*, 60 Ill. App. 93 (1894), plaintiff's intestate was killed by being pushed or falling off the platform

of a train, where he was compelled to stand, on account of the overcrowded condition of the train. Judgment for \$5,000 for plaintiff affirmed.

CHICAGO & ALTON R. R. Co. v. GATES, 61 Ill. App. 211 (1895), was an action for damages for injuries sustained while passing over the platform of a car to find a seat in another car. There were obstructions on the platform. Judgment for plaintiff affirmed, defendant being negligent in permitting dangerous obstruction on platform.

WEST CHICAGO STREET RAILROAD Co. v. McNULTY, 64 Ill. App. 549 (1896), was an action for injuries sustained by plaintiff while a passenger on defendant's street car, he being thrown from the car in a collision which occurred between the car and a wagon. Plaintiff was riding on the footboard of the car. One of his legs was broken and he sustained other injuries. On the trial there was a verdict and judgment for plaintiff for \$2,500. On appeal judgment was affirmed, the questions of negligence and contributory negligence being questions of fact for the jury to determine.

engines were based upon a theory not supported by any evidence in the case. Those that proceeded upon the theory that there was evidence that the defendant had notice that the covering was a defective one, were properly refused, for the reason that the man and cover thereto, being a part of the defendant's track connection, it was presumptively negligence to maintain a covering which should occasion injury to its passengers. *North Chicago St. R'y Co. v. Cotton*, 140 Ill. 486.

Such of the instructions as required the plaintiff to show what part of his injuries were attributable to the original cause, as separated from those due to the lack of care by him in getting cured of them, were either erroneous in whole, as not stating the correct rule of law in regard to the duty one who receives an injury is under, to take reasonable care that his injuries shall not, by undue neglect, become aggravated, or were covered by other instructions given. And besides, such instructions failed to include the element that the plaintiff had knowledge, or reasonable cause for knowing, that he needed better care and attention in getting cured than he gave or caused to be given to himself, and that such increased care and attention were within his means and power. *Kennedy v. Kusse*, 60 Ill. App. 440.

Those instructions that treated of the subject of latent defects, and notice thereof, were properly refused. They were too broad. In case of a latent defect in one of the appliances for the carriage of passengers, the question is not whether the carrier had actual notice of it sufficiently long before the accident to have corrected and repaired it, but is whether, by the exercise of that high degree of care required of passenger carriers, it might have been discovered and remedied.

We find no error in the refusal of any of appellant's instructions, and there being no substantial error in any part of the record which has been brought to our attention, the judgment of the Circuit Court will be affirmed.

CHICAGO AND ALTON RAILROAD COMPANY v. WOOLRIDGE.

Appellate Courts, Illinois, Third District, May Term, 1889.

[Reported in 32 Ill. App. 237.]

PASSENGER INJURED BY BAGGAGE TRUCK ON STATION PLATFORM—NOT NEGLIGENCE TO LEAVE WAITING ROOM.—Where plaintiff, a passenger, waiting at a station to board

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one of defendant's trains, was injured by a baggage truck, used on the platform, striking against a moving train, it was not error to refuse to charge that plaintiff was guilty of negligence in leaving the waiting room before his train arrived, as to hold that a passenger waiting at a railroad depot for his train to arrive must remain in the waiting room, and that if he goes out upon the platform at any time before it becomes necessary to board his train, he is guilty of such negligence as to prevent his recovery for an injury like the one in question, is not consistent with reason or common sense (1).

APPEAL from the Circuit Court of Macoupin County. The facts appear in the opinion. *Judgment affirmed.*

RINAKER & RINAKER, for appellant.

R. B. SHIRLEY, for appellee.

Conger, J.—This was an action by appellee against appellant for injuries to his person caused, as stated in the first count of his declaration, by the negligence of appellant's servants in permitting a baggage truck used on the depot platform to be run and driven against its train of cars while the latter were in motion. Verdict and judgment for appellee for \$225.

The main facts as stated on the trial by appellee were that he resided in Shipman, and on the evening of October 9, 1888, came

1. Among other actions relating to Accidents at Stations, etc., are the following:

IN PENNSYLVANIA CO. v. KRANE, Adm'r, 41, Ill. App. 317 (1891), judgment for plaintiff was affirmed in an action for damages for death of plaintiff's intestate, who was killed by a train while attempting to board train at a station.

CHICAGO, BURLINGTON & QUINCY R. R. CO. v. MAHARA, 47 Ill. App. 208 (1892), was an action for damages for injuries sustained by plaintiff who was struck by a train at the depot while about to take another train. Trial resulted in judgment for plaintiff for \$10,000. On appeal judgment was reversed on the ground of contributory negligence in failing to exercise due care in standing upon the platform.

CHICAGO, BURLINGTON & QUINCY R. R. CO. v. CZAJA, Adm'r, 59 Ill.

App. 21 (1895), was an action for damages for death of plaintiff's intestate who was killed while crossing track at station after alighting from one of defendant's trains. Judgment for plaintiff affirmed.

IN CHICAGO & EASTERN ILLINOIS R. R. CO. v. CHANCELLOR, Adm'r, 60 Ill. App. 525 (1895), it appeared that plaintiff's intestate was struck and killed by a train as she was crossing defendant's track at a station to take passage on another train. Judgment for plaintiff affirmed, the railroad company being held negligent.

IN CHICAGO, ST. PAUL, & KANSAS CITY R'Y CO. v. RYAN, 62 Ill. App. 264 (1895), it appeared that plaintiff while on the track at defendant's depot, about to board a train, was struck and injured by another train that ran past the station at a speed of twenty-five miles an hour. Judgment for plaintiff for \$6,000 affirmed.

to Carlinville to a political meeting, and about ten that evening went to appellant's depot to return home. He says: "I reside in Shipman, Illinois, am thirty-three years old, a carpenter by trade; came to Carlinville on the evening of October the 9th, the day of the 'Fifer rally,' on the C. & A. train from the south; I went back to the C. & A. depot a short time before the lightning train came in from the south; my train going south, was on the side track; I went in the waiting room, stayed a little while, went down on the north end of the depot platform and came walking back just as the lightning came in; there was a crowd on the platform; as I walked up, the baggage man came rolling the truck down just as the train came in going north; same as the train; he got pretty close to me, and let the truck get into the train, and it struck me; I saw it as it struck the train; there was some baggage on the truck and he was rolling it right towards me; I was towards the building, and the people were giving the road for him; I was about twelve feet from the truck when it struck the train, northeast, next the house, and it was on the edge of the platform; don't know if Seaman was rolling the truck at the time it was struck; he had hold of the truck when it struck, rolling it along and it struck the car; it was a large baggage truck; I was knocked down, hurt on the leg; there were seven places showing where I was struck, and injuries show yet; I was helped into the depot waiting room and on the train and went to Shipman that night." He had procured a ticket at Shipman for the round trip.

Appellant introduced evidence tending to show a different state of facts. The baggage master, Mr. Seaman, in reference to the accident says:

"I am the baggage master of the C. & A. R. R. at Carlinville, Ill., and have been for thirteen years last past; was on October 9th, last; I receive baggage, check it and put it on the cars; I wait until the train is in sight and then run truck up to where train stops for baggage, and usually, have time to go in and get the mail; I know where the train will stop; if there is not time to get the mail I stay until train stops and put the baggage on.

"On the night of this accident I was on duty when the lightning came in, and had three pieces of baggage for Springfield, all checked; one was a boot and shoe trunk; I had them on the baggage truck south of the baggage room door at about 9 o'clock and until No. 3 had turned the corner, when I lit the gas at the baggage room door and then ran my baggage to where they usually stop; I

pulled my baggage with my right hand and pushed the mail cart with my left; I was at the north end of the truck with the mail cart at my left hand as I went up, pushing it; the effect of the way I was pulling it would be to run the rear end of the truck more towards the house than the train, because I was pulling it on one side.

"I stopped right opposite the office door and turned facing the building, holding the baggage truck with my right hand and my left hand a hold of the mail cart; didn't know but that they might shove it into the train; I didn't leave it at all; such a crowd there; the engine and mail car passed me all right, that is all that I remember.

"Just as I got on the truck to light the gas a man said he had a trunk he wanted checked, but I refused because I then did not have time; I didn't see him any more only as he came past me with the truck, the express truck; it came down from the north end same time train was coming in; came right down past my truck; past the north end of my truck, where I was standing still holding it; don't know what became of it; I was knocked down and didn't know where it was until after the train pulled out; up to the time that truck came past, nothing had happened to me; there was one trunk on it."

Other witnesses corroborate to some extent the statements of these two.

The theory of appellee is that the baggage master carelessly allowed one end of his truck to come in contact with the train, thereby throwing it forward and causing the injury to appellee; while appellant urges that the collision of the baggage truck with the train was caused, not by any fault or negligence of the baggage master, but because a stranger ran the express truck, upon which was his trunk, through the crowd upon the platform and against the baggage truck.

This was a question of fact to be determined by the jury and we find nothing in the evidence to warrant us in saying they have found erroneously.

Objection is made that the court erred in refusing to submit a number of special interrogatories to be answered by the jury. We think no error was committed in this respect. All that were material or relevant were included in others that were given to the jury. The first and third instructions given appellee, and which are as follows, are claimed to be erroneous:

1. The court instructs the jury, that persons passing over or

standing on a depot platform, in a proper manner and going there in a reasonable time for the purpose of taking a train, are not trespassers; and the servants of a railroad company, knowing the enhanced danger at the depot ground to persons constantly passing and repassing, are required to exercise a greater degree of caution, for the preservation and safety of life, than at other places, where persons have no right to be and where the employees of the company need not expect to find them.

3. The court instructs the jury, that a railroad company is liable for the negligent acts of its servant, if done in the course of his employment, even though the company did not authorize or know of such acts, or may have forbidden them; but the act must be done while the servant is engaged in the service he is employed to render, and must also be done in the course of that employment.

The principal criticism of these instructions seems to be that they fail to state that appellee must himself have been in the exercise of due and ordinary care at the time. We see no force in this objection. They do not pretend to determine the liability of appellant under the circumstances shown, but lay down the general principles of care and caution required of appellant's servants in which we see no error.

The fourth refused instruction of appellant in substance states that unless the plaintiff was at the place where he was injured, on the platform of defendant's depot, on business with the defendant, or was there to take a train about to depart from the station, or to meet some one expected to arrive on the train then arriving, or to see some one about to leave on that train, then, if there was a suitable waiting room, though he was expecting to depart on some other train for which he may have been waiting, he had no right to be at the place he was, when he was injured.

We do not think this states the law correctly. To hold that a passenger waiting at a railroad depot for his train to arrive must remain in the waiting room, and that if he goes out upon the platform at any time before it becomes necessary to board his train, he is guilty of such negligence as to prevent his recovery for an injury like the one in question, is not consistent with reason or common sense.

After a careful consideration of the whole case, we fail to see any good reason for interfering with the judgment of the Circuit Court and it will therefore be affirmed.

Judgment affirmed.

LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY v. SIMS.

Supreme Court, Indiana, November Term, 1866.

[Reported in 27 Ind. 59.]

RIDING ON PLATFORM OF TRAIN—PLEADING.—In an action against a railroad company to recover damages for an injury to a passenger while on its train, where the answer alleged that the passenger was, at the time of the accident, standing upon the platform of the car, contrary to the rules of the company, of which he had notice; that it was dangerous to stand upon the platform while the train was in motion; "wherefore defendant says that the injury sustained by the plaintiff was the result of his own carelessness in being in an improper and dangerous place," it was *held*, that the answer failed to show that the injury was occasioned by the fault of the plaintiff in being in a dangerous position on the train.

APPEAL from the Tippecanoe Common Pleas. The facts appear in the opinion. *Judgment affirmed.*

R. JONES and **S. A. HUFF**, appeared for appellant.

Ray, Ch. J. — This was an action by the appellee against the appellant. The complaint alleged that while he was travelling on the cars of the appellant as a passenger, and without any fault or negligence on his part, and through the negligence of the appellant, he was injured.

The defendant answered, that the train on which the appellee was at the time of the injury, was a passenger train; that on all the passenger cars, printed notices that "passengers are forbid standing on the platform," were, and always had been posted; that the appellee, for five years had been in the habit of riding in the passenger cars of the appellant where such notices were so posted in conspicuous places, and had notice of such regulation; that at the time of said accident, he was riding upon the platform of one of the passenger cars, and not in the car; that said platform was, and always is, a dangerous place; that at the time of said accident, said appellee was on said platform, and immediately before said accident had been sitting on the brake on said platform, against the will of said appellant; wherefore the appellant says that whatever injury the appellee sustained was the result of his own carelessness and wrong in being in an improper and dangerous place at the time

said accident occurred, and from which the injuries complained of resulted.

The appellee replied, averring that there was no room furnished inside of defendant's passenger cars, sufficient for the proper accommodation of its passengers, at the time said injuries complained of took place.

A demurrer to this reply was overruled, and this presents the only question for our determination. It will be observed that the answer does not allege, as a matter of fact, that the appellee was injured by reason of his position on the platform of the car, but simply avers that he was informed of the rule prohibiting passengers from sitting on the platform; that he was on the platform at the time of the accident, and that the platform was always a dangerous place. These are all the facts alleged, and from these facts the appellant concludes that the position of the appellee caused his injury. This conclusion, of course, adds nothing to the answer. The complaint avers that the appellee was without fault contributing to his injury. Do the facts stated in the answer, considered with the additional facts alleged in the reply, and which the demurrer admitted to be true, amount to a denial of this averment in the complaint? The appellant, by the sale of a ticket to the appellee, had entitled him to transportation upon the train, and the fact that there was no room within the car did not relieve the company from this obligation, as the contract to carry had not been made to depend upon such a contingency. *Hawcroft v. Great Northern R'y Co.*, 8 Eng. L., and Eq. 362 (1). The company was in fault in failing to pro-

1. The facts in *GREAT NORTHERN RAILWAY COMPANY v. HAWCROFT*, 21 L. J., Q. B. 178, 16 Jur. 196, were as follows: H., intending to go to L. and back by railway, paid for and received from the company the following ticket at B., and went to L. with it: "B. to L. and back. Excursion ticket. To return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof." A morning and an evening return excursion trains were advertised on the Saturdays, but they were not advertised to go to B. On a Saturday morning within the fourteen days H. presented himself at the L. station in time for the morn-

ing return train. It became full, so that he could not find room in it, and it would have been dangerous to have added other carriages to it. The company refused to let him go by an ordinary train, but kept him waiting until the evening return train, in which he found a place. That train took him only to D., where it arrived on Sunday morning. No trains ran from D. to B. on Sundays. The line from D. to B. belonged not to the company sued, but to another company. H. then hired a carriage to take him from D. to B., and brought an action to recover the expense from the company: Held, that by the terms of the excursion tickets

vide proper and secure places for the passengers it had contracted to carry. And while it may be true that such failure, on the part of the company, would not justify the passenger in taking a dangerous position upon the train, or, indeed, in entering and continuing upon the train, if he was fully informed of the condition of the accommodations provided before the cars started, still, the allegation that he did take such a position, with no averment that he was informed, in time to leave the train, that the company had failed to provide proper accommodations, and with no allegation that as a matter of fact his position in any manner contributed to his injury, constitutes no defense to this action. An averment that a passenger occupied a dangerous position upon the train, does not authorize the pleader to draw the conclusion that therefore the injury "was the result of his own carelessness and wrong." The conclusions from the facts are to be drawn by the court or jury, and an averment would have better served the purposes of a plea. The facts alleged in the answer may be true, and yet not inconsistent with the averment in the complaint that the injury resulted from the negligence and carelessness of the appellant, and without the fault of the appellee. We have not discussed the provision of the statute exempting railroad companies from liability for injuries to passengers standing upon the platform of a car, where sufficient accommodations have been provided within the car, and a notice properly posted, forbidding passengers to ride upon the platform, as it is not claimed that the answer brings the appellant within the protection of the statute. No error is complained of upon the instructions given to the jury, nor is it argued that the finding is not supported by the evidence, although the instructions and evidence are both embraced in the bills of exceptions.

A brief for a *supersedeas* was filed by the appellant. No brief was filed for the appellee.

The judgment is affirmed, with one-eighth of one per cent. damages and costs.

and advertisements, the company contracted to carry H. back to B. on any day within the fourteen days that he might choose, and by any of the advertised trains that he might select; that not sending him by the morning train was a breach of contract, and that taking him only to D., instead of to B., without previous notice, was a second breach, and that con-

sequently the action was maintainable.

Semble, a railway company is not excused from carrying passengers according to their contract, upon the ground that there is no room for them in the train; but, in order to avail themselves of this answer, they should make their contract conditional upon there being room.

INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY V. RUTHERFORD.

Supreme Court, Indiana, November Term, 1867.

[Reported in 29 Ind. 82.]

CONTRIBUTORY NEGLIGENCE.—If the negligence of the plaintiff has directly contributed to the injury received by him, he cannot recover.

CARRIER OF PASSENGERS.—The duty of a carrier of passengers does not extend to the imprisonment of the passenger, so as to prevent him from voluntarily exposing himself to needless peril.

PASSENGER'S ARM PROTRUDING OUT OF WINDOW OF CAR.

—The carrier is not bound to barricade the windows of its coaches to prevent passengers from extending their limbs through outside; and where an injury resulted to a passenger from his arm, which was extended by him several inches outside the window, coming in contact with the structure of a water tank, it was held that the carrier was not liable.

APPEAL from the Morgan Circuit Court. The facts are stated in the opinion. *Judgment reversed.*

S. P. OYLER and **D. W. HOWE**, for appellant.

W. R. HARRISON and **W. S. SHIRLEY**, for appellee.

FRAZER, Ch. J.—The suit was for injuries received by the plaintiff while a passenger on the defendant's (now appellant) cars. The general denial was pleaded. A special answer, alleging that the injuries resulted from the carelessness of the plaintiff, was stricken out on motion, and this is assigned for error. It was right. The fact could properly be proved under the general denial.

For the same reason, as well as that it was in the discretion of the court to allow, or not, a further answer after the cause was at issue, there was no error in a refusal to leave to file an additional paragraph, of the same legal effect as that which had been stricken out.

The putting of certain interrogatories to the jury is also complained of. We need not determine whether the interrogatories were proper, for the reason that even if they were improper, it would not follow that the judgment must be reversed. We do not say that the putting of improper interrogatories could, in no case, result in injury to a party, but in this case no possible injury could have followed, and hence if there was error in that respect, it is not available here.

The evidence showed that the injury received was a broken arm,

and that at the time of the accident the plaintiff's arm was projecting out of the window of the coach in which he rode, in consequence of which it came in contact with some object outside, probably a timber frame supporting a water tank. The jury found specially, in answer to an interrogatory, that the injury would not have happened if the plaintiff had kept his arm inside of the car. In consequence of damages to the main track of the railroad, caused by a recent freshet, the train was, on this occasion, compelled to pass a short distance upon a side track which was dangerously near to the structure of the water station, if passengers allowed their limbs to protrude a distance of three or four inches outside of the windows of the carriages. The injury occurred by reason of the plaintiff having no notice of the special danger. It did not appear that slats or other appliances were provided to prevent persons from protruding their limbs outside the windows.

The jury were instructed as follows: 1. That the mental suffering of the plaintiff might be taken into consideration in fixing the damages, should the verdict be for him. 2. That the same skill and diligence was required of the defendant, in running its train temporarily on a side track, as on the main track, and if, in running on the side track, there was a special danger from the close proximity to that track of fixed structures, it would be negligence in the defendant not to notify passengers of such special danger. 3. That the defendant was bound to provide wire gauze, bars, slats or other barricades, to prevent passengers from putting their arms out of the car windows, and if the plaintiff's arm was casually extended two or three inches outside, and by reason of the close proximity of the water tank, he sustained the injury, the verdict should be for the plaintiff. 4. That if the water tank was so remote from the track as not reasonably to endanger passengers resting their limbs on the window sill, and casually extending them a little beyond the outer edge of the car, and the plaintiff extended his arm so far beyond the car as to expose it to collision with the tank, such exposure would be negligence on his part, and the verdict should be for the defendant.

These instructions are called in question, as also the refusal of the court, on the defendant's motion, to instruct that the plaintiff could not recover if his arm or elbow was protruding out of the window, by reason of which he sustained the injury. Our attention is called to other questions, but in their presentation the rules of this court, designed to secure intelligibility in argument, and

thus enable the court to dispose readily of the business before it, have been disregarded; and hence, as is now our uniform custom, we do not consider those questions.

The sufficiency of the evidence to support the verdict (\$700 for the plaintiff) is also presented for consideration. This judgment cannot stand. Nothing is better settled than that in such a case, if the plaintiff's negligence has directly contributed to the injury, he cannot recover. A passenger is as much bound to use reasonable care to avoid injury as the carrier is to use the greatest degree of skill and care to save the passenger from harm. Nor does the duty of the carrier extend to the imprisonment of the passenger so as to prevent the latter, by his recklessness or folly, from voluntarily exposing himself to needless peril. Though a passenger, he is nevertheless a free man. Railway coaches are provided with windows to promote the health of passengers by affording light and ventilation, and that the tedium of a journey may be relieved in some degree, and its pleasure enhanced by viewing the objects along the route. The place for the passenger is inside, not outside, of the coach, and this is known to everybody who ever saw a railway coach. The carrier is no more bound to barricade the windows, to prevent passengers from extending their limbs outside, than he is to lock the doors to prevent them from going from car to car when the train is in motion, and thus voluntarily subjecting themselves to the dangers obviously incident to that act of rashness. The same reason which would require the one thing, would also require the other; nay, it is not easy to say why it would not require that the passenger should be so restrained of his liberty in every respect that he could not, by any act of his own, put himself in unnecessary danger. Such a power in railroad officials must exist, if the duty to exercise it exists. The obligation to answer in damages cannot be separated from the authority to do what is necessary to avoid liability. The law recognizes no such duty as resting upon carriers of passengers, nor have they any authority to exercise such unreasonable and annoying power over those whom they carry. Their passengers are not their slaves, nor are the latter absolved from the duty of using ordinary care for their own safety. Unwarranted, officious and insulting interference with the liberty of passengers by railroads, had proceeded in this State to such a point that the legislature, at its last session, deemed it necessary to interfere and impose severe penalties to prevent one form of the annoyance. Acts 1867, p. 165.

The proposition put by the court below for the guidance of the jury, that it is the duty of the carrier to barricade coach windows, etc., finds some sanction in *New Jersey R. R. Co. v. Kennard*, 21 Pa. 203 (1), but it is so entirely at variance with the weight of authority and with elementary principles, that we cannot recognize it as good law. This case has recently been directly condemned and overruled by the same court, in *Pittsburgh and Connellsville R. R. Co. v. McClurg*, 56 Pa. 294 (2).

Holbrook v. Utica and Schenectady R.R. Co., 12 N.Y. 236, is also relied upon by the appellee as sustaining the action of the court, but in our opinion that case is very far from it. There, it was a controverted question whether the plaintiff's arm was inside or outside of the car when the injury occurred. The court below had charged the jury that the railroad company only contracted to carry the plaintiff safely, provided she kept within the cars; that it was for the jury to say whether her elbow was out of the cars at the time it was injured, and if it was, then it was a fact from which they might infer want of ordinary care on her part. The defendant had moved the court to instruct that if the jury found the plaintiff's arm was outside of the window when the injury was received, it was an act of negligence, and she could not recover. The chief question in the appellate court was, whether the refusal of this instruction was error. That it was a correct statement of the law, was not questioned in the court of appeals, either in the argument or in the opinion of the court. Indeed, the opinion is quite to the contrary, but there was held to have been no error in its refusal, for the sole reason that the lower court had charged the jury substantially in accordance with the request, and was right in declining to repeat it.

It cannot be necessary to cite authorities in support of the views upon this subject already announced in this opinion. We content ourselves with a reference to *Todd v. Old Colony R. R. Co.*, 3 Allen, 18, and the *Catawissa R. R. Co. v. Armstrong*, 49 Pa., 186, for a clear and forcible statement of the law upon the subject as it has been settled for ages.

The judgment is reversed, with costs, and the cause remanded for a new trial.

1. Reported with the *Pennsylvania* cases in volume 10.

2. Reported with the *Pennsylvania* cases in volume 10.

BEDFORD, SPRINGVILLE, OWENSBURG AND BLOOMFIELD RAILROAD CO. v. RAINBOLT.

Supreme Court, Indiana, November Term, 1884.

[Reported in 99 Ind. 551.]

BREAKING OF A BRIDGE AND TRAIN FALLING THROUGH—PRESUMPTION OF NEGLIGENCE.—In an action to recover damages for injuries sustained by a passenger through the train breaking through a bridge it was held that the accident raised a presumption of negligence on the part of the railroad company, which the company must rebut by proof (1).

INSTRUCTION.—It was not error to refuse to charge that if the fall of the bridge resulted from the breaking of a rod, which had in it an undiscoverable defect, the railroad company was not liable for plaintiff's injury.

FROM the Owen Circuit Court. The facts appear in the opinion. *Judgment affirmed.*

M. F. DUNN, G. G. DUNN, A. G. CAVINS and E. H. C. CAVINS, for appellant.

E. E. ROSE and E. SHORT, for appellee.

1. *Among other actions relating to Accidents from Fall of Railway Bridges are the following :*

LOUISVILLE, NEW ALBANY & CHICAGO R'Y Co. v. THOMPSON, Adm'r, 107 Ind. 442 (1886), was an action for damages for death of plaintiff's intestate, who was killed by reason of the train on which he was travelling falling into the river, due to a bridge giving way by being weakened by a flood. There was a verdict for plaintiff and defendant company appealed to the Supreme Court. Held, that where a bridge is weakened by a sudden and unprecedented flood, and there is no time or opportunity for inspecting it and ascertaining its condition, the carrier is not responsible for an injury resulting from its giving way beneath a train run with proper care and skill. If it is apparent to those in

charge of a train that the track and bridges have been made unsafe by tempests or floods, the trains must be run with a care proportioned to the known danger. Held that the jury were warranted from the evidence in finding that the company had not used due care in inspecting the bridge or in running its train across it. *Judgment affirmed. Petition for rehearing overruled.*

LOUISVILLE, NEW ALBANY & CHICAGO R'Y Co. v. PEDIGO, 108 Ind. 481 (1886), was an action for damages for injuries sustained by plaintiff by reason of the train on which he was a passenger falling into the river through the break down of a defective bridge. *Judgment for plaintiff for \$4,500.* On appeal it was held that evidence as to rate of speed of train in passing over the bridge on which repairs were being

Mitchell, J. — Solomon Rainbolt, on the 8th day of November, 1881, became a passenger on one of the trains of the Bedford, Springville, Owensburg and Bloomfield Railroad Company, to be carried from Switz City to Bedford.

While being thus carried, the car in which he was seated, together with the train by which he was proceeding, was precipitated into White river while passing over an iron or combination bridge built or used by the company. He sustained severe, and it is claimed permanent, injuries by the fall, and from being involved in the wreck of the train in the river.

His complaint for damages is in three paragraphs, which are in no material respect different from each other.

Preceded by the formal averments, the default of the railroad company is averred in the first paragraph, as follows: "That by the carelessness, negligence and default of its agents and employees, and for want of due care and attention to its duty in that behalf, the said cars broke through the railroad bridge across White river." And in the second as follows: "That by the carelessness, negligence and default of its agents, servants and employees, and for want of due care and attention to its duty in that behalf, the locomo-

made was admissible as part of the *res gestæ*. Held also that it was not sufficient to rebut presumption of negligence by carrier showing that the repairs were being made by means and appliances ordinarily used by prudent persons, but it must also be shown that they were ordinarily sufficient and were used with utmost care and diligence. Judgment affirmed. Rehearing denied.

LOUISVILLE, NEW ALBANY & CHICAGO R'Y Co. v. SNYDER, 117 Ind. 435 (1888), was an action for damages for injuries sustained by plaintiff due to the train on which he was a passenger falling through a defective bridge into the river. Judgment for plaintiff affirmed, the court holding that the duty of the railway company is not discharged by trusting, without inspecting and testing, to the reputation of manufacturers' materials and external appearance of same used in construction of a rail-

way bridge. The law requires not only careful and skillful test and inspection of materials, but inspection from time to time during their use.

In **LOUISVILLE, NEW ALBANY & CHICAGO R'Y Co. v. KEEFER**, 146 Ind. 21 (1896), an action for damages for injuries to an express messenger caused by the fall of a railroad bridge, it was held that a contract between a railroad company and an express company, by which the latter assumed all risks and damages to its messenger while on the railroad, is binding upon an express messenger who entered into a contract with such express company, thereby assuming all risks of accidents and danger incident to such employment, however occasioned, and thereby empowering such company to enter into a contract exempting the railroad company from all liability to injuries to him. Judgment against railroad company reversed.

and cars were run upon and through the railroad bridge," etc. and in the third as follows: "That said defendant did, by its servants, agents and employees, carelessly, and negligently conduct the running of said cars, and was so in default in the care and oversight of said railroad and bridges thereon, that said cars were run upon the railroad bridge over and across White river, said bridge being, as defendants knew, insecure, and were thereby thrown into White river." Each paragraph concluded with an averment of the injuries sustained, and a claim for damages.

The trial resulted in a verdict and judgment, over a motion for a new trial, for the plaintiff, from which judgment the appellant prosecutes this appeal.

The argument of appellant's counsel embraces four points:

1. That the complaint is not sufficient, for failing to show, either by direct averment or by its statement of facts, that the appellee was himself without fault. For this alleged error, it is contended, the motion in arrest of judgment should have been sustained, there having been no demurrer to the complaint.
2. That by reason of the failure of the jury to make direct an-

Injured on freight train.—OHIO & MISSISSIPPI RAILWAY CO. *v.* DICKERSON, 59 Ind. 317 (1877), was an action for damages for injuries sustained by a passenger on a freight train. Held that while a railroad company is not bound to receive and carry passengers in the caboose of a freight train, yet, if it does so receive and undertake to carry them it is bound by all the obligations of a common carrier of passengers upon regular passenger train. Judgment for plaintiff affirmed.

Injured on gravel train.—LAWRENCEBURG & UPPER MISSISSIPPI R. R. CO. *v.* MONTGOMERY, 7 Ind. 74 (1856), was an action for damages for injury to person travelling on a gravel train, the injury being caused by a collision. Held, that it was not sufficient for the railroad company to show that plaintiff was acting at the time in disobedience of

a proper order to secure his safety, but it should appear that the injury was caused by such disobedience. Judgment for plaintiff in the Circuit Court affirmed.

Trespasser—Infant.—In PENNSYLVANIA CO. *v.* DEAN, 92 Ind. 459 (1888), an action to recover damages for injuries sustained by an infant, it was alleged that the plaintiff while on one of defendant's trains, was ordered by the employees of said defendant to jump off the train while the same was in motion, and, in doing so, was severely injured. Trial resulted in judgment for plaintiff. On appeal it was held that the complaint should show whether plaintiff was on the train as a trespasser or passenger, and defendant's motion to make complaint more specific in that respect and also as to the negligence complained of should have been granted. Judgment reversed.

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swers to some of the interrogatories propounded, a *venire de novo* should have been awarded.

3. That the court erred in giving, and refusing to give, certain instructions to the jury. A summary of those given and complained of, and those refused, will be found farther on.

4. That certain testimony admitted on behalf of the appellees as rebutting evidence was incompetent.

Concerning the first point, we have to say that while it is, and ought to be, the rule, that in actions for damages growing out of the alleged negligence of another, it must always be made to appear from the complaint, either by direct averment or by the statement of the facts and circumstances under which the injury occurred, that the plaintiff was without contributory fault or negligence, we are of the opinion that the complaint in this case is, nevertheless, sufficient within that rule.

The averment that the injury occurred in a given case without the fault or negligence of the plaintiff is not always controlling; nor is the absence of such averment in every case to be taken as a failure to aver due care.

Taking all the allegations of a complaint together, and notwithstanding the formal negative averment, the presumption of contributory negligence may appear, as in the cases of *President, etc. v. Dusouchett*, 2 Ind. 586; *Riest v. City of Goshen*, 42 Ind. 339, and other cases, or conversely, as in *Duffy v. Howard*, 77 Ind. 182, and cases there cited.

From the averments in the complaint, in this case, it must be taken that the appellee was lawfully a passenger on the appellant's train of cars, presumably submitting to its rules and regulations as such. The giving way of the railroad bridge, over which the train was passing, precipitated him violently into the river below, inflicting upon him the injuries complained of, and it must be held from the situation in which the appellee is shown to have been, the relation which he occupied toward the railroad company, which relation placed him under no duty except to remain passive in its hands while being carried, that all presumption of negligence on his part is rebutted by the averments of the complaint. *Mitchell v. Robinson*, 80 Ind. 281, 41 Am. R. 812; *Michigan Southern, etc., R. R. Co. v. Lantz*, 29 Ind. 528 (1).

It is suggested in the argument, that it does not appear, but that

1. Abstract of this case reported in this volume, page 287, *post*.

may have conducted himself negligently after the bridge went
down, in the endeavor to extricate himself from the wreck, etc.;
we are not disposed to hold that a passenger who without fault
was involved in a disaster of the apparent magnitude of that
described, should be required to aver or prove that he acted
with prudence and deliberation while so involved. The court com-
mits no error in overruling appellant's motion in arrest.

Is it error to overrule the appellant's motion for a *venire de novo*
intended in counsel's second point? If the question was prop-
erly raised in the record, the answer to it would depend upon
the interrogatories, the answers to which are complained
of as being pertinent and direct, and whether such answers are un-
certain, indefinite or evasive.

The question of the sufficiency of the answers to the interroga-
tories is not properly raised by a motion for a *venire de novo*. A
venire de novo can only properly be awarded where the verdict of
the jury is so imperfect that a judgment can not be rendered
upon it.

A general verdict, however, when in proper form, covers all the
issues in a given case, and it can not be said, because an answer
to an interrogatory returned with a general verdict, properly framed,
is indefinite, uncertain or ambiguous, that, therefore, there is either
a failure to find on all the issues, or that there is an ambiguity in
the finding or verdict of the jury. Until overthrown by a special
verdict, absolutely inconsistent with it, the general verdict stands,
and the judgment which follows is supported by it, and does not
in any manner depend for support on the special interrogatories,
nor failing to observe the distinction between a special verdict or
a finding of facts, and answers to interrogatories propounded
to the jury. Some of the cases have held that the failure of the jury
to make certain and definite answers to interrogatories may be a
ground for a *venire de novo*, but the proper way of saving the ques-
tion in such case is indicated in *West v. Cavins*, 74 Ind. 265; *Mc-*
Donagh v. Guard, 32 Ind. 408, and *Ogle v. Dill*, 61 Ind. 438. These
cases hold that a failure of the jury to make definite answers to
interrogatories, where there is a general verdict returned, is not
a ground for a *venire de novo*, and what is said in *Peters v.*
55 Ind. 391, and *Carpenter v. Galloway*, 73 Ind. 418, indicat-
ing a different rule, may be regarded as modified by the later cases.
We have examined the questions propounded to the jury, and
the answers, and while some of them are not answered directly, we

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are, nevertheless, of the opinion, considering the character and construction of the questions, that the answers can not be said to be improper. For the reasons mentioned, there was no error in the ruling of the court in overruling the motion for a *venire de novo*.

The next point argued is that the court erred in giving, of its own motion, instructions numbered 8, 9, 11 and 12, and in refusing to give the appellant's instructions, prayed for, numbered 4, 5, 6, and 7. That we may not extend this opinion beyond bounds, we will give only the substance of the instructions complained of, which were given by the court, embracing all that is material to present the questions raised.

In the eighth instruction the jury were told, in substance, that if they should find from the evidence that the plaintiff was injured by an accident arising from a defect in the road or bridge of said company, without any fault on his part, the legal presumption is that the injuries of the plaintiff were caused by the negligence of the defendant, and that this presumption might be overthrown by proof that the injuries complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide.

And in the ninth the jury were told, in substance, that while a common carrier does not, in legal contemplation, warrant the absolute safety of passengers, it is yet bound to the exercise of the utmost diligence and care, and that the slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render it liable to answer in damages; and that the law imposed upon a common carrier the duty of providing strong and sufficient carriages or cars for the journey, and good and sufficient track, culverts and bridges for said carriages or cars to pass over, and to provide conductors and other agents whose duty it is to use every precaution against danger, and that it was bound to take notice of the manner in which its road and the bridges are constructed, and the plan and size thereof, and whether they are of such size and built on such plan as are required for the safety of their passengers. It also contained, substantially, the same instruction as to the presumption of negligence and burden of proof as the eighth.

The eleventh and twelfth instructions were as follows:

"11th. If you find from the evidence that the accident was occasioned by a condition of things which the company could neither foresee nor provide against, then you should find for the defendant."

"12th. If you find from the evidence that the immediate cause of the alleged disaster was the want of the proper construction of said bridge over White river, either as to size, material, piers, or the adjustment thereof, then you should find for the plaintiff, unless you should further find that the size and construction of said bridge were right and proper for the use intended, and that the material in said bridge had been properly tested, by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and said disaster was caused by a defect in said material which could neither be foreseen nor provided against by human foresight and care, then you should find for the defendant."

The objections which appellant's counsel urge against the foregoing instructions may be comprehended under the following summary:

First. That in laying it down as the law of the case, that if the accident and injury complained of were proved, a legal presumption arose that the railroad company was guilty of such negligence as cast upon it the burden of proving that the disaster occurred without any degree of negligence on its part; and,

Second. That in instructing the jury that the slightest neglect on the part of the railroad company against which human prudence and foresight might have guarded, resulting in the disaster and injury complained of, rendered the company liable, and that it could only be excused from liability by showing that the disaster resulted from a condition of things which could neither be foreseen nor provided against by human foresight and care, the court stated a rule not warranted by the law, and too strict to be reasonably required of a common carrier of passengers.

As respects the burden of proof, we think the instruction of the court was clearly right. The instruction was in all essential particulars the same as that considered in the case of *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462 (1). In that case, an instruction, directing the jury that where a passenger in a railroad car was, without his fault, injured by the car in which he was riding being thrown from the track, the law will presume negligence on the part of the railroad company, was held to be a correct statement of the law, and the decision is fully sustained by the reasons given and the authorities cited.

1. An abstract of this case appearing among the notes of cases relating to derailment of trains, on page 289, *post*.

Any other rule would, in many cases, leave a passenger who sustained an injury by the defective condition of a railway track or bridge practically without remedy. The contract which the law implies between the carrier and passenger is that the carrier has a safe and sufficient railroad track to the point of the passenger's destination; that its bridges and all the other means provided by it for his carriage are safe, and that all suitable means had been taken beforehand to carry him safely and without hurt to the point indicated. The condition of its cars, track and bridges, and the precautions which it has taken for their security and the safe transport of the passenger, are peculiarly within its own knowledge, and while, in most cases, it would be a denial to the injured passenger of all remedy to require him to show affirmatively wherein the company had failed, it is deemed a just and reasonable rule that the company should take the burden of showing that it used all proper precautions for the passenger's safety. *Philadelphia, etc., R. R. Co. v. Anderson*,^{94 Pa. St.351,39 Am.R.787}. Some distinction is sought to be drawn by counsel between a "*prima facie* presumption" and a "legal presumption," and it is urged that the jury might well have understood, from being told that a legal presumption of negligence arose from the accident and injury, that such presumption was conclusive. We do not think the criticism justified. As used, we can perceive no difference between a *prima facie* presumption and a legal presumption. In this regard, as well as in respect to the degree of care required of a common carrier toward a passenger, and the condition of things which will exonerate it from liability for an injury occasioned to a passenger resulting from a defective track or bridge, the instructions stated the law to the jury with commendable accuracy and precision.

The rule that there may be degrees in negligence has long ago been discarded in this State, and when it is said that an occurrence came about through the slight negligence or gross negligence of another, it is, in either case, nothing more than saying that such person was negligent; and so when the court told the jury that if the injury was occasioned through the slightest neglect of the railroad company, against which human prudence and foresight might have guarded, it would be held liable, it was equivalent to saying that if the appellant, by the exercise of prudence and foresight, might have discovered the defective condition of its bridge, then the neglect to exercise such prudence and foresight, resulting in injury, would render it liable. The addition of the word "human" to pru-

dence and foresight required, neither added to nor detracted from the degree of care required.

The degree of diligence which the law requires of railroad companies, in keeping their track, bridges, culverts and cars in a safe condition, is expressed in a variety of terms in the books, but after a careful examination of the adjudged cases, we have been able to discover none in which a rule less exacting than that laid down by the court in this case was announced. In the maintenance of its track and bridges in a secure condition, the highest degree of practical diligence and care are required on the grounds of public policy. Considering that vast numbers of human beings are daily committing themselves to the care and fidelity of railroad companies, which for an adequate reward engage to transport them with great speed from point to point, any negligence in the maintenance of their tracks and bridges in such condition of safety, as practical skill and sagacity have attained to and applied generally to the subject, should not be tolerated.

While this rule does not require that common carriers should insure the safety of passengers, nor involve such an imaginary or speculative degree of skill or care as the human mind might conceive of or invent, so as to insure the safety of tracks and structures beyond all peradventure, it does, nevertheless, require that the highest degree of practical care and skill, consistent with the known, usual and approved appliances for that purpose, should be used and properly maintained.

A fair consideration of all the instructions given by the court are within this rule, which is approved, among many others, by the following authorities: *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304 (1), and the numerous cases there cited and commented upon; *Toledo, etc., R. Co. v. Conroy*, 68 Ill. 560; *Railroad Co. v. Aspell*, 23 Pa. St. 147 (2); *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225; *Galena, etc., R. R. Co. v. Yarwood*, 15 Ill. 468 (3); 2 *Rorer R. R.*, 955, 956, 1086, 1088, and authorities there cited.

Most of the instructions which were asked by the appellant, and refused by the court, were intended to modify the rule of diligence as required in the instructions given by the court, and concerning these nothing need be added to what has already been said on that subject.

1. Reported with the *New Hampshire* cases, page 555, *post*. 147, is reported in 6 Am. Neg. Cas. 225.
2. *Penn. Co. v. Aspell*, 23 Pa. St. 208, *ante*. 3. Reported in this volume, page

The fourth instruction asked by the appellant, and refused by the court, was, in substance:

That if the jury should find from the evidence that the accident was caused by the breaking of any particular rod in the bridge, which had in it an original internal defect, and that said rod, being necessary for the support of the bridge, broke, and that the breaking of said rod occasioned the fall of the bridge and train, and if the rod and bridge had had sufficient tests to justify the company in relying upon its safety, and the defect in the rod was not discoverable by reason of its position in the rod, or in the iron shoe or wood in which it was concealed, then the plaintiff could not recover.

We think all that is relevant to the case in the foregoing instruction was comprehended in the instructions given by the court. Part of it relates to the degree of vigilance and care to be exercised by the company in the construction and maintenance of the bridge, which was covered by the instructions given by the court. That part of the instruction which proposes the theory that the bridge may have fallen on account of the breaking of one defective rod, is negatived by an answer of the jury to one of the appellant's interrogatories, in which the jury say, in substance, that the fall of the bridge was not caused by the breaking of one single rod. By this answer it is shown that the failure to give the instruction worked no detriment to the appellant; moreover, as we find no evidence tending to prove that this bridge fell by the breaking of one particular rod, or that any properly constructed railroad bridge would be liable to fall by the breaking of any one particular rod, we are not prepared to say, as a matter of law, that a railroad bridge so constructed as to depend for its safety on the integrity of any one rod would be such a bridge as, in the exercise of the degree of diligence required, a railroad company would be warranted in erecting or continuing in use.

Substantially, this instruction asked the court to say, as a matter of law, that if the fall of the bridge resulted from the breaking of any one rod, which had in it an undiscoverable defect, if such rod had been sufficiently tested to justify the company in relying upon it, then it was not responsible.

We find in the record no evidence that a bridge so constructed would be suitable for the important purpose for which this bridge was intended, and if we were obliged to pronounce upon the subject as a matter of law, without evidence to the contrary, we would

that a railroad bridge designed to carry passenger trains over important river, so constructed as that the giving way of one tie rod would precipitate it, with its train load of human beings, to the depths below, was not constructed with due care and skill. We do not say that a railroad bridge so constructed would not be sufficient, as a matter of law. It may be that engineering skill, as practically applied to the construction of railroad bridges, has discovered nothing better. What we do say is that until proof is made to the contrary, we can not say, as the instruction in question seems to propose, that a bridge so constructed and used is sufficient for the purpose it was intended to subserve. We think there was no error in following the appellant's instructions.

The last point made by counsel for appellant is that the court committed error in permitting the appellee to introduce evidence in rebuttal, showing the condition of the bridge and abutments some time before and at the time of the injury.

As the appellant had introduced evidence as part of its defense tending to show that the abutments and bridge were in proper condition at and shortly before the injury, we think the evidence introduced in rebuttal was competent, and that it was not necessarily a part of plaintiff's original case. It is true, the appellee introduced the evidence as part of his original case tending to show the imperfect and unsafe condition of the bridge, but this did not preclude him from introducing evidence tending to rebut the appellant's evidence on particular points, which tended to show that the bridge and abutments were safe.

We are impressed with the conviction, after reading the evidence in the case, that, considering the extent of the injuries actually suffered by the appellee, the damages were excessive, but this was a matter peculiarly within the province of the jury, and, as we find no error in the record, the judgment is affirmed.

DERAILMENT OF TRAIN—INJURY TO PERSON—COMPLAINT.—In an action for damages sustained in a derailment of a train, the Supreme Court (per GREGORY, CH. J.), in an opinion by defendant from Noble Common Pleas, stated the case as follows:

Suit by the appellee against the railroad company for 'an injury to the person.' The case was tried in the court below on an issue framed by the general denial. Verdict for the plaintiff; motion for reversal of judgment overruled; and this is the alleged error for which reversal of the judgment is sought.

It is averred in the complaint that the defendant owned and was

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operating a railroad passing through Noble county, and received the plaintiff as a passenger for hire; that it was the duty of the defendant to keep its road in good repair, and to use proper care that the plaintiff was safely carried, etc.; yet, the defendant did not keep its road in good repair, but carelessly permitted a broken and defective rail, resting on a rotten and defective cross-tie, to remain for a long time in a dangerous and unsafe condition, by means whereof the train of cars on which the plaintiff was being carried was thrown off the track and precipitated down an embankment, by means whereof the plaintiff was injured.

"It is claimed that the complaint is defective for not alleging that the injury occurred without the fault or negligence of the plaintiff. In *Evansville and Crawfordsville R. R. Co. v. Dexter*, 24 Ind. 411, this court held that 'the averment must be either expressly made in the complaint that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged, that such must have been the case.'

"In view of form No. 14, 'for injury to the person' (2 G. & H. 377), we could not hold that an express averment of the kind is necessary, but we think that the statutory form shows that the injury complained of was the result solely of 'the carelessness of the driver in the service of the defendant.' In the case at bar, the averments of the complaint show that the appellee was injured solely by the carelessness of the appellant in failing to repair its road track." *Judgment affirmed.* J. B. and W. NILES, appeared for appellant; W. H. COOMBS and W. H. H. MILLER, for appellee. *Supreme Court, Indiana, May Term, 1868.* *Michigan Southern & Northern Indiana R. R. Co. v. Lantz*, 29 Ind. 528.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY V. MILLER.

Supreme Court, Indiana, May Term, 1895.

[Reported in 141 Ind. 533.]

DERAILMENT OF TRAIN—SPECIAL VERDICT—CONTRIBUTORY NEGLIGENCE.—Where it appears from a special verdict, in an action for damages sustained while a passenger in a railroad car, that plaintiff went into defendant's passenger car for the purpose of being safely carried from T. to I., took a seat therein provided by defendant for passengers, paid the regular fare to the conductor and remained sitting in his seat all the time until the train, running at the rate of thirty miles an hour, was thrown from the track, including the car he was in, which rolled down an embankment and injured him, the fact of freedom from contributory negligence is sufficiently made to appear, without taking into consideration that part of the special verdict stating that he was exercising such care, prudence and caution as prudent persons would, and do, under like circumstances.

RAILMENT OF TRAIN—PRESUMPTION OF NEGLIGENCE.—

In an action by a passenger for injuries received by reason of the defective condition of the railroad track, where it is found that the cause of injury was the rotten condition of the ties on a three-degree curve, so that they were insufficient to hold the spikes that held the rails to the ties, and the speed of the train around the curve, at the rate of thirty miles an hour, by which the rail was displaced, letting the train off the track, precipitating it down an embankment, injuring plaintiff, a *prima facie* case of negligence is made against the railroad company (1).

BURDEN OF PROOF.—The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger is upon the carrier, and this presumption can be overcome only by clear and explicit proof that the accident could not have been avoided by the utmost practical care and diligence.

FROM the Clinton Circuit Court. The facts are stated in the opinion. *Judgment affirmed.*

G. W. KRITZINGER, E. C. FIELD, S. O. BAYLESS and C. G. KUENTHER, for appellant.

E. RITTER, H. L. RITTER, C. S. WESNER, D. J. McMATH, W. GARD and J. C. FARBER, for appellee.

1. Among other actions relating to derailment of trains, are the following:

GRAND RAPIDS & INDIANA R.R. Co. v. BOYD, 65 Ind. 526 (1879), was an action for damages for injuries sustained by a passenger by reason of the breaking of an axle which caused the car to be thrown from the track. There was a conflict between the general and special verdicts. On appeal it was held that the general verdict being in favor of plaintiff and the special verdict in favor of defendant, the railroad company was entitled to judgment, and judgment for plaintiff was reversed.

PITTSBURGH, CINCINNATI & ST. LOUIS R. R. Co. v. WILLIAMS, 74 Ind. 2 (1881), was an action for injuries sustained by plaintiff by reason of the derailment of the train on which he was travelling, due to a broken rail. Judgment for plaintiff for \$7,500 affirmed.

CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS R.Y. Co. v. ix—19

NEWELL, 75 Ind. 542 (1881), an action for damages for injuries sustained by the derailment, due to a broken rail, of the train on which plaintiff was a passenger. Trial by jury; verdict and judgment for railroad; motion for new trial overruled; appeal to general term and judgment of special term reversed; appeal to Supreme Court. Held that certain instructions given at trial, placing burden of proof as to broken rail upon plaintiff, were erroneous, as such an accident raised a presumption of negligence against railroad which it should rebut. Judgment rendered at general term affirmed.

On new trial of the case the verdict and judgment was for plaintiff, which, on appeal, was affirmed. **CLEVELAND, COL., CIN. & IND. R. Co. v. NEWELL**, 104 Ind. 264 (1885).

In **LOUISVILLE, NEW ALBANY & CHICAGO R.Y. Co. v. JONES**, 108 Ind. 551 (1886), a passenger was injured by reason of the derailment of

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McCabe, J.—This was an action by the appellee against the appellant in the court below for damages on account of an alleged personal injury, resulting from the alleged negligence of the appellant. Trial by jury, special verdict assessing the damages at \$12,500. Appellant's motion for judgment in its favor on the special verdict was overruled, to which it excepted.

Its motion for a new trial, assigning as reasons therefore many errors in the trial leading up to the verdict, among which were that it was contrary to law and not supported by sufficient evidence, was sustained and a new trial was granted.

On a second trial by jury another special verdict was returned assessing appellee's damages at \$10,000. The court rendered judgment upon that verdict over a motion for a new trial. * * *

The second special verdict contains the following facts:

"That on the 27th day of January, 1890, the plaintiff, at the town of Terhune, entered into a passenger car of the defendant and seated

a train. Trial resulted in favor of plaintiff for \$4,000. On appeal it was held that an instruction asked by the defendant, that a railway company may propel its trains at such speed as it sees fit, and that no rate of speed is negligence *per se*, was properly refused. The condition of the cross-ties, etc., and the speed of the train, are important elements in the negligence charged. Judgment affirmed. Rehearing denied.

In **CITIZENS STREET R'y Co. v. TWINAME**, 111 Ind. 587 (1887), a passenger in a street car was injured by reason of the car running off the track at a place where the same was being repaired. Verdict and judgment for the plaintiff on the trial which was affirmed at general term. On appeal to the Supreme Court, judgment affirmed, the court holding that the railway company failed to exercise the utmost skill and care required in the performance of their duty as carriers.

Derailment—Travelling on pass.—In **GILLENWATER v. MADISON & INDIANAPOLIS R. R. Co.**, 5 Ind. 339

(1854), it appeared that defendants employed plaintiff to frame and build a bridge on their road across Sugar Creek, and while he was engaged in the work, the defendants directed him to proceed in their cars to Greenwood, and assist in loading timbers for the bridge. While thus on their cars as directed, the servants of defendants who had in charge the running of the train, so carelessly managed and ran the same, without the leave, sanction, or consent of the defendants, that they were thereby run off the track; by means of which the plaintiff's right hand was fractured and permanently injured, so as to disable him from pursuing his business of house carpenter. Held, that the plaintiff was a passenger, and that defendants were liable for the injury. Held also, that the fact that a passenger who has received an injury, was travelling free of fare, does not exempt the railroad company from liability for the injury. Judgment for defendants in trial court reversed.

self upon a seat provided by the defendant for the use of passengers in said car, for the purpose of being carried from this said town of Terhune, to the said city of Indianapolis, and then and there paid the conductor of said cars and train the regular fare or charge of defendant for carrying a passenger from the said town of Terhune to the said city of Indianapolis; that on said date, at a point about one hundred and seventy-eight feet north of a trestle over what was known as Wilkinson's run, about three-fourths of a mile north of the town of Carmel, in the county of Hamilton, in the State of Indiana, and near the middle of a three degree curve in the track of the defendant's railroad, the left or east rail of said track had been raised by placing blocks of wood, called shims, from one-eighth of an inch to one inch in thickness, on seventeen consecutive ties, under said left or east rail; that from one-fourth to one-third of said ties under said left or east rail were rotten at a point where the spikes were driven into said ties; that all of said ties were more or less decayed or defective; that said

Freightman—Stockman.—INDIANAPOLIS, BLOOMINGTON & WESTERN RY. CO. v. BEAVER, 41 Ind. 498 (1873), was an action for damages for injuries sustained by the overloading of car in which plaintiff was acting in charge of his stock and freight. Held, that such person was a passenger and entitled to the same rights and remedies of a passenger. Judgment for plaintiff for \$750 affirmed.

OHIO & MISSISSIPPI RY CO. v. [Name], 47 Ind. 471 (1874), was an action for damages for injuries to plaintiff, a stockman, caused by the negligence in which he was riding being thrown from the track. Held, that the railroad was liable for injuries caused by its negligence, to a passenger as in the case of a passenger for fare. Judgment for plaintiff affirmed.

PENNSYLVANIA CO. v. NEW-CASTLE, 129 Ind. 402 (1891), plaintiff, who was in charge of a carload of goods, took passage in the caboose attached to the freight train in which the stock was shipped. A broken

axle under one of the freight cars caused the train to be thrown from the track. The train was alleged to be running at great speed at the time of the accident, and it was also alleged that the employees in charge of the train were intoxicated. Trial resulted in verdict and judgment for plaintiff. On appeal, judgment affirmed. Held, that it was proper to show in support of allegation, that engineer was in the habit of drinking intoxicating liquors, by evidence as to his recent drinking. Held, also, that a request for an instruction to the effect that running the train at a speed of forty miles an hour was not negligence *per se*, was properly refused.

Postal clerk.—OHIO & MISSISSIPPI RY CO. v. VOIGHT, Adm'r, 122 Ind. 288 (1889), was an action for damages for death of plaintiff's intestate, a railway postal clerk, who was killed in a railroad wreck, the train on which he was travelling, in performance of his duties, being derailed, owing to the breaking of an axle. Judgment for plaintiff, which, on appeal, was affirmed.

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spikes had been raised for the purpose of putting said blocks or shims under said rail on said ties, and then driven back into the same holes from which they had been drawn ; that from one-fourth to one-third of said ties under said rail were too rotten to hold said spikes ; that on the date aforesaid, and while the plaintiff was a passenger on said train as aforesaid, and sitting in seat in defendant's car for the purpose of being carried from the said town of Terhune to the said city of Indianapolis, when said train was on the curve aforesaid, at a point one hundred and seventy-eight feet from the north side of said trestle as herein described and located, and while said train was running at the rate of thirty miles an hour, and when the trucks under said train had struck said rail on said seventeen ties at a point one hundred and seventy-eight feet north of said trestlework over Wilkinson's run, that by the momentum of said train and the rotten condition of said ties, so that they were unable to hold the spikes, and the said rails having been raised by blocks, and the said spikes having been pulled out and driven back in the said holes, by reason thereof, said rail turned outwardly from its proper position to an angle of about forty-five degrees, and thereby caused the car and train upon which the plaintiff was a passenger as aforesaid, to leave the track and be precipitated down an embankment a distance of about ten feet, upsetting and turning the car in which the plaintiff was then seated on its side and throwing the plaintiff from his seat on the left side of said car, and about the center, lengthwise thereof, where he was seated in said seat, so provided by defendant for the use of its said passengers, across the car, and to the opposite side thereof, and to the front end of said car, thereby, and by reason of the facts herein stated and without any fault on his part, the plaintiff's life was imperiled, and he had suffered severe and permanent physical injuries in his head, arm, legs, and body, and was thereby rendered unable to perform physical or manual labor, and thereby caused to suffer great pain and anguish in both body and mind ; that the plaintiff seated himself upon a seat in said car that had been provided by said defendant for passengers on entering said car at said town of Terhune ; and remained sitting in said seat until thrown therefrom, by the said car leaving said track of defendant as aforesaid, and that during all the time from said plaintiff's entering said defendant's car to the occurrence of said accident and derailment, the plaintiff was exercising such care and caution, and prudence as prudent persons would and do exercise under like circumstances, namely, by remaining seated as aforesaid, until thrown therefrom as aforesaid ; that the plaintiff still suffers great pain from said injuries and will do so for the remainder of his life ; that at the

of said injuries the said plaintiff was forty-five years of age, prior thereto, and up to the time of said accident was a man of good health, and able to do all kinds of manual and physical labor, and to transact and carry on an extensive business, such as buying and handling large quantities of corn, wheat, oats, hay, and railroad ties, and do a general mercantile business, such as is carried on in any country store buying and selling dry goods, hats, shoes, hardware and groceries; that since he has received said injuries, and on account of said injuries, he has been and still is unable to move about or go around without the assistance of crutches, and during all of that time required the care and attention of an attendant to enable him to arise from his chair or to seat himself, and to move about with safety, and has been rendered unable to give personal attention to his said business by reason of said injuries. Now, if on the foregoing facts, the plaintiff is entitled to recover against the defendant, then we find for the plaintiff and assess his damages at ten thousand dollars.

And, if, upon the facts aforesaid, the defendant is entitled to recover, then we find for the defendant.

“Robert Carrick, Foreman.”

The first objection urged against this verdict is that it fails to show that the appellee was free from contributory negligence, and that, therefore, the appellant's motion for judgment in its favor thereon ought to have been sustained. It is the law that the plaintiff in such cases must prove, and it is the right of the defendant charged with negligence to insist on proof by satisfactory evidence, that he did not contribute to the injury by negligence on his part. This proof, in the form constitutes a part of the plaintiff's cause of action, without which there can be no recovery. *Toledo, etc., R. W. Co. v. Annagan*, Adm'x, 75 Ind. 490; *Pennsylvania Co. v. Myers*, Adm'x, 136 Ind. 242; *Evansville, etc., R. W. Co. v. Krapf*, 36 N. E. 901.

It is also settled law, as contended by the appellant, that if the special verdict fails to find any fact essential to entitle the plaintiff to judgment then the defendant's motion for judgment should be sustained, unless the case is one where the burden is upon the defendant. *Dixon v. Duke*, 85 Ind. 434; *Trittip v. Morgan*, 99 Ind. 269; *Wymire v. Lank*, 121 Ind. 1.

The burden was upon the plaintiff in this case. The question now remains, did the special verdict find facts sufficient to show the absence of contributory negligence in the appellee? It finds on that subject that on the 27th day of January, 1890, he, at the town of

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Terhune, entered into a passenger car of the defendant and seated himself upon a seat provided by the defendant for the use of passengers in said car, for the purpose of being carried from said town of Terhune to the city of Indianapolis, and then and there paid the conductor of said cars and train the regular fare, or charge, for carrying a passenger from said town of Terhune to said city of Indianapolis; that at said date, at a point on said road (describing it) toward Indianapolis, and while said train was running at the rate of thirty miles an hour (describing the defective condition of the ties and track), thereby caused the car and train upon which the plaintiff was a passenger as aforesaid, to leave the track and be precipitated down an embankment * * * upsetting and turning the car in which plaintiff was then seated on its side and throwing the plaintiff from his seat on the left side of said car * * * across the car (describing the injuries thereby inflicted on him); * * * that he * * * remained sitting in said seat until thrown therefrom by said car leaving said track of defendant as aforesaid, and that during all the time from said plaintiff's entering said defendant's car to the occurrence of said accident and derailment, the plaintiff was exercising such care and caution and prudence as prudent persons would and do exercise, under like circumstances, by remaining seated as aforesaid, until thrown therefrom as aforesaid.

It is contended that so much of the above finding as stated that appellee at the time was exercising care and caution is not a finding of facts, but is a statement of a mere conclusion of law. If it is, then appellant's contention must prevail, that such conclusion of law must be disregarded by the court in declaring the law arising upon the facts found in the verdict. *Dixon v. Duke, supra*; *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186; *Indianapolis, etc., R. Co. v. Bush*, 101 Ind. 582; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Indiana, etc., R. Co. v. Barnhart*, 115 Ind. 399; *Chicago, etc., R. Co. v. Burger*, 124 Ind. 275.

If, however, the verdict states all the facts essential to a recovery after eliminating such alleged conclusions of law, it will be sufficient and the motion for judgment for the defendant thereon ought to be overruled. *Pittsburgh, etc., R. Co. v. Adams, supra*; *Indiana, etc., R. Co. v. Finnell*, 116 Ind. 414; *Branson v. Studabaker*, 133 Ind. 147.

It has long been the established rule in this State that an exception to the conclusions of law stated on a special finding of facts admits that the facts have been fully and correctly found. *Hartman v. Aveline*, 63 Ind. 344; *Robinson v. Snyder*, 74 Ind. 110; *Helms v.*

gnor, 102 Ind. 385; Wynn v. Troy, 109 Ind. 250; Blair v. Blair, Ind. 194.

The only difference between a special verdict and a special finding is that one is found by the jury and the other by the court; and the other difference, that the law is declared in the one case by written statements or conclusions in advance of the judgment, and in the other it is declared by the rendition of the proper judgment upon the special verdict; in the one case objection to the conclusions of law is made by an exception thereto after their statement in writing, and in the other the objection is made to the conclusion or declaration of law by the facts found in the special verdict by objecting to the rendition of the judgment on the verdict in favor of the adverse party and asking for judgment thereon in favor of the objector and excepting to the refusal thereof. Hoosier Stone Co. v. McCain, Adm'r, 133 Ind. 1; Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186.

The same principle applies to these exceptions that does on an exception to conclusions of law on a special finding, namely, such objection admits, for the purposes thereof, that the facts have been fully and correctly found in the special verdict. Hoosier Stone Co. v. McCain, Adm'r, *supra*; Pittsburgh, etc., R. Co. v. Spencer, *supra*. It therefore follows that for the consideration of the question whether the special verdict shows the absence of contributory negligence in the appellee, it is admitted that there were no other facts, acts or omissions on the appellee's part touching the accident than those set forth in the verdict. That being true, all of the acts or omissions of the appellee in connection with the accident are comprised in the narration that he went into appellant's passenger car to be fully carried from Terhune to Indianapolis, took his seat therein, provided by appellant for passengers, paid the regular fare to the conductor, that he remained sitting in his seat all the time until the train, running at the rate of thirty miles an hour, was thrown from the track, including the car he was in, which rolled down an embankment and injured him.

This being all that was done or omitted to be done by the appellee in connection with the accident, the court was able to declare, as matter of law, that he was not guilty of contributory negligence, without bringing into consideration that part of the special verdict stating that he was exercising such care, prudence and caution as prudent persons would, and do under like circumstances. * * *

In support of the assignment of error in overruling appellant's motion for a new trial, a great number of rulings in the reception of evidence are urged upon our consideration for the reversal of the judg-

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ment. A number of questions and their answers were objected to by appellant seeking to prove what experience the appellee had had in the purchase and sale of dry goods, groceries, staves, wheat, corn, oats and such stuff as was raised in that immediate vicinity and the quantities purchased by him; also, appellee's physical ability and health previous to the injury received by him; also, his habits of industry. The objections urged by appellant's learned counsel in their able and exhaustive brief are as follows: "The objections to this class of questions proceed upon the ground that no value can be placed upon one man's experience as against another for the purpose of recovering damages in this class of cases; that the use of a man's experience, the profits arising from such use, the amount of business transacted by him for any period of time preceding the injury, involve a purely speculative value. * * * All of these inquiries touching the industrious habits, ability or experience of Miller called for mere conclusions, which belonged exclusively to the court to find upon the facts found and returned by the jury in their special verdict."

It was held by this court in Ohio, etc., *R. Co. v. Voight, Adm'r, supra*, at page 269, that it was proper in estimating the damages in such a case for the jury to take into consideration the plaintiff's habits of industry, occupation, opportunities for employment, health, prospects of life, and be governed also by ordinary human knowledge and experience as to age at which he would likely have remained capable of labor, as shown by the evidence.

To the same effect is *Cleveland, etc., R. R. Co. v. Newell, supra*.
* * *

It is further contended that the court erred in admitting in evidence over appellant's objection a table of life expectancy. The reasons urged here against the admissibility of such evidence are that it is not applicable where damages are sought to be recovered for personal injuries received where the injured person is living, and are only applicable where death results from the injury; that the tables offered, too, were not properly authenticated and no foundation had been laid for their introduction.

Standard life tables may be introduced to show the probable duration of the plaintiff's life on the question of compensation for permanent injury; or, in case of death, the deceased's expectation of life at the time of the accident. *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 125, 19 Am. & Eng. R. R. Cas. 173; *Coates, Adm'r, v. Burlington, etc., R. Co.*, 62 Iowa, 487, 15 Am. & Eng. R. R. Cas. 265; *Sauter, Adm'r, v. New York, etc., R. R. Co.*, 66 N. Y. 50, 5 Am. & Eng. Encyc. Law, 67; *Shover, Adm'r, v. Myrick*, 4 Ind. App. 7.

In the latter case a full and valuable discussion of the question will be found, and a great many of such tables are referred to as are regarded standard and authoritative by the courts, among which are the Carlisle tables, the ones introduced in this case. And it is there said that the courts take judicial knowledge of such standard tables. Those tables were read from the "Encyclopædia Britannica" in this case. In *Donaldson v. Mississippi, etc.*, R. R. Co., 18 Iowa, 280, the Carlisle tables were held to be admissible in evidence. To the same effect are *Walters v. Chicago, etc.*, R. R. Co., 41 Iowa, 71; *Central R. R. Co. v. Crosby*, 74 Ga. 737; *McKeigue, Adm'x, v. City of Janesville*, 68 Wis. 50; *Central R. R. Co. v. Richards*, 62 Ga. 306.

In Iowa it has been held that the "Encyclopædia Britannica" containing the Carlisle Life Tables may be introduced in evidence in a proper case. *Worden v. Humeston, etc.*, R. Co., 76 Iowa, 310. There was no error in receiving in evidence such tables. * * *

Judgment affirmed. Rehearing denied.

MEMPHIS AND OHIO RIVER PACKET COMPANY V. MCCOOL.

Supreme Court, Indiana, May Term, 1882.

[Reported in 83 Ind. 392.]

PASSENGER INJURED ON STEAMBOAT—FALLING OBJECT—
EVIDENCE AS TO DEFECTS IN BOAT—IRRELEVANCY.—

In an action to recover damages for injuries sustained by a passenger on a steamboat, a bale of cotton having fallen upon the passenger, it was error to permit evidence showing defective construction of boat and for such error judgment was reversed.

FROM the Vanderburgh Circuit Court. *Judgment reversed.*

C. DENBY and D. B. KUMLER, for appellant.

J. M. SHACKELFORD, A. GILCHRIST, J. S. BUCHANAN, H. C. GOODING and C. H. BUTTERFIELD, for appellee.

ELLITT, J. — The complaint of the appellee alleges that the appellant is a common carrier of passengers, owning and using, for the purpose of carrying passengers for hire, a steamboat called *James D. Parker*; that he was received as a passenger on that boat; that while standing near the foot of a stairway used for receiving and discharging passengers and freight, the appellant's servants engaged in loading a bale of cotton goods of great weight, negligently suffered it to fall from the top of the stairway upon the appellee, seriously bruising and wounding him.

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The questions requiring examination arise upon the ruling denying a new trial.

The appellee proved by Robert Roberts that, at the time of the trial, and in Evansville, the reputation of Jacob Hoglin, one of appellant's witnesses, was bad, and was afterwards permitted to prove by Andrew J. Rutledge what it was, prior to his removal to Evansville, in the town of Newburgh, eight miles distant, while he, Hoglin, lived there a time two or three years anterior to his taking up his residence in Evansville. On cross-examination Roberts testified as follows: "I never heard any one in Evansville say anything about Hoglin's reputation except John Ingle; I heard him say it was bad a year ago next summer; I have heard my father and others talk about his reputation at Newburgh." It may be granted that Roberts' testimony is not of very much weight, yet it certainly does tend to prove the reputation at the time of the trial and at the place where the witness Hoglin then resided, and this gave the appellee a right to go back, within reasonable limits, to other times and places. Where there is evidence showing the character at the time of trial, the assailing party may follow back the line of the witness's life to ascertain what it was at a prior time. Reputations are, ordinarily, things of slow growth, but there may possibly be cases where the transformation from good to bad or bad to good is sudden and rapid. However this may be, the question is one of fact, and the jury are to be put in possession of such evidence as will enable them to intelligently comprehend and decide it. If an attacking party should prove the reputation for a month before the trial, would he not greatly strengthen his attack by travelling back a year or two and showing the continuous nature of the witness's reputation? So, if the witness assailed should show his reputation at the same period, would he not materially strengthen his defense of his character by evidence running back into his life for a reasonable time? Suppose, for illustration, the assailing party gives evidence of the witness's reputation for a brief time before the trial, as a day, a week, or a month, and the defending party gives evidence commencing at the same period, and extending back to other times, would not the case of the latter, all other things being equal, be made the stronger?

The cases are all agreed that the character at the time of the trial is the question in issue, but they are not all agreed as to how this issue shall be proved. Some of the cases in our own reports intimate that the evidence must be confined to the time of the trial; others say that the evidence may be directed to a reasonable time anterior to the trial; but, with the question as presented in the cases referred to, we

not at present immediately concerned, for here there was some evidence of the witness's reputation at the time of the trial, and this distinguishes the case in hand from those referred to. We think the appellee had a right to take up the witness's reputation and set it back, within reasonable bounds, for such a length of time as would enable the jury to decide upon the credibility of the witness who spoke of it with reference to the time of the trial, and we cannot say that two or even three years was an unreasonable limit. In *People v. Abbott*, 19 Wend. 192, Cowen, J., said: "The character of the habitual liar or perjurer seven years since, would go at least to fortify testimony which should now fix the same character to the same person. Witnesses must speak on this subject in the past tense. Character cannot be brought into court and shown to them at the time of trial. A long-established character for good or for evil, is always more striking and more to be relied on, than that of a day, month or a year."

Randison Terry, a witness for the appellee, was asked, upon his direct examination, this question: "How do the steps on the Parker compare with the steps on other steamboats?" Appellant's counsel objected, and stated specific grounds of objection. It will be seen, from our synopsis of the complaint, that there is no charge that the steamboat was improperly constructed or equipped, and that the sole basis of complaint is the negligence of the servants who were engaged in moving the bale of cotton goods. The appellant was not, therefore, called upon to meet any question as to the manner in which the steamboat was constructed; the only charge it was required to defend was that of the negligence of its servants. It was competent to prove the location of the stairway, its abrupt or gradual ascent; for these are matters connected with the occurrence which caused the appellee's injury. It was proper to show all the surroundings for the purpose of enabling the jury to correctly determine the question of negligence on the part of the appellant, as well as the question of the appellee's freedom from negligence. But it was not proper to bring the case a question as to whether the stairway was or was not constructed with due care and skill. Evidence that the stairway was insufficient and defective one might support a cause of action, but the one declared on, and the appellee had no right to establish any other. He had, before asking the question we have copied, fully described the situation, condition and kind of stairway on the steamboat, and by this question and answer went much further and made it to be not a proper one, as compared with those of other steamboats. The question calls for a comparison with other stair-

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ways, and carries the investigation beyond the particular boat on which the appellee received his injury. The question and answer would naturally induce the jury to believe that they were trying the question of the negligent construction of the stairway as well as the question of the negligence of the servants who were moving the bale of goods. Suppose that a railway company were sued for the negligence of a brakeman in using a brake, would it be proper on the trial of such a case to prove that the brake was an improper or defective one? Or, to put another case, suppose an engineer were taking fuel and should carelessly drop it upon a passenger, and the company were sued for this cause, would it be proper to prove a defect in the locomotive? But the present case is even stronger, for the witness is asked to make a comparison, and this could only be for the purpose of showing that the stairway was an improper or defective one, because not as safe or suitable as those of other boats, and this surely was clearly outside of the issue. *Hudson v. Densmore*, 68 Ind. 391.

It is no doubt true that where the question is, which of two persons is the taller, or which of two stairways the steeper, a non-expert witness may state which he believes to be the taller or steeper, for this is really not the expression of an opinion but the expression of a conclusion derived from the observation of facts. If in this case the issue had been whether the Parker's stairway was steeper than that of another, or other designated boats, a witness who had seen them all might state which he believed to be the steeper. This was not, however, the issue, and the testimony was irrelevant. If a carrier were sued for negligence in using vehicles or boats of improper and unsafe character, it would not even then be proper to ask such a question as that propounded to the witness in this case. It certainly is not competent to ask for such a general comparison as was here done, if, indeed, it be competent to ask for a comparison at all. To permit counsel to enter into such an inquiry upon the direct examination would lay open an almost boundless field. It would bring into question all the boats to which the witness had reference, and would involve an inquiry into the construction and character of each and all of them. It would do even more than this; for it would lead to conflict of opinion as to which was the better and safer, and thus carry the investigation to most unreasonable lengths. We are speaking now of a direct examination, for it is sometimes proper on cross-examination in order to test the witness's competency as an expert, to permit inquiry as to his standards of comparison.

Appellee's counsel say that if the testimony was incompetent it was not material and did no harm. If we could clearly see that the testi-

ny did not harm the appellant, we should not reverse for the error admitting it, but this we can not do. The case is a close one upon evidence, and we are unable to say that the admission of this incompetent testimony might not have turned the scale against the appellant. *Mays v. Hedges*, 79 Ind. 288.

It is contended by appellant's counsel that, where an injury happens to a passenger through the act of a servant, the burden of proving negligence is upon the passenger, and that the rule, that where an injury is proved a *prima facie* case is made, applies only to defects in machinery for carriage, and not to the acts of the carrier's servants. A distinction is attempted to be drawn between the liability for the condition of the machinery of transportation and the responsibility of the servants engaged to operate the machinery. The case of the *Federal, etc., R. Co. v. Gibson*, 11 Rep. 443, is cited in support of the position of the counsel. If that case is to be understood as holding such a doctrine as counsel maintain, we can not give it our approval. We are unwilling to sanction the doctrine which the appellant insists on, for we regard it as unsound in principle and in conflict with the decided weight of authority. The duty of a common carrier is not only to provide safe machinery, but also to employ competent persons to operate it, and to see to it that they are not negligent. The duty is substantially the same as to the capacity and conduct of the servants as it is in respect to the means of transportation. If the machinery is perfect, and the servant who operates it negligent, there is a breach of duty. There is no reason for making a distinction between the character of the machinery and the conduct of the servants managing it. The presumption of negligence upon proof of an injury to the passenger, whom the carrier is bound to carry safely, can not be divided so as to apply to the machinery and not to those who are entrusted with its management. The distinction attempted to be drawn is an arbitrary one without any supporting principle. The duty, as we have said, is not confined to the means of transportation, but extends to the competency, care and diligence of the servants employed by the carrier. As declared in *Crofts v. Waterhouse*, 3 Bing. 319, the servant "must have competent skill, and must use that skill with diligence (1)." The principle embodied in this declaration has

In *CROFTS v. WATERHOUSE*, 3 Bing. 319, it appeared that the driver of a stage coach gathered a stone, and upset the coach. He had passed the spot where the accident happened twelve hours before, but in

the interval a landmark had been removed. In an action for an injury sustained by this accident, the judge told the jury that as there was no obstruction in the road, the driver ought to have kept within the limits

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been approved by a long line of cases; among them, *McKinney v. Neil*, 1 McLean, 540 (1); *Stokes v. Saltonstall*, 13 Pet. 181 (2); *Holladay v. Kennard*, 12 Wall. 254; *Philadelphia, etc., R. R. Co. v. Derby*, 14 How. 468; *Pittsburgh, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. R. 111; *Bass v. Chicago, etc., R. Co.*, 36 Wis. 450, 17 Am. R. 495 (3); *Caswell v. Boston, etc., R. R. Co.*, 98 Mass. 194 (4). The duty as to the skill, care and diligence of the servants being essentially the same as that respecting machinery, there is no reason for making a distinction as to the burden between cases where the act of the servant is the cause of the injury, and that where the injury is caused by the machinery. In *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462, this court quoted with approval from the opinion in *Edgerton v. New York, etc., R. R. Co.*, 39 N. Y. 227, the following: "Whenever a car or train leaves the track, it proves, that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves, that the defendant, whose duty it is to keep the track and the machinery in the proper condition, and to operate with the necessary prudence and care, has, in some respect, violated this duty." But it is not necessary to elaborate this point, for running through the cases referred to in this opinion, and by those cited in *Pittsburgh, etc., R. R. Co. v. Williams*, is a cord binding together responsibility for the condition of the machinery and the conduct of servants, thus showing that the method of proof is the same whether the inquiry be as to the conduct of the servant or the condition of the machinery.

For the error in admitting the testimony of the witness Terry, the judgment must be reversed.

INSTRUCTION TO JURY—PROXIMATE CAUSE OF DEATH.—In an action for injuries resulting in death caused by the negligence of employees of a railroad company, when the court instructed the jury to find whether or not the death of the deceased was

of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict; and a verdict having been returned accordingly, the court granted a new trial on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence.

1. *McKinney v. Neil*, 1 McLean,

540, is reported in 7 Am. Neg. Cas. 612.

2. *Stokes v. Saltonstall*, 13 Pet. 181, is reported in 7 Am. Neg. Cas. 297.

3. *Bass v. Chicago, etc., R. Co.*, 36 Wis. 663, is reported in 8 Am. Neg. Cas. 663.

4. Reported with the *Massachusetts* cases in this volume, *post*.

caused by the act of defendant, it was not error to refuse an instruction that they should find whether or not the defendant's act was the proximate cause of the death of the deceased.

INJURY TO PASSENGER NOT ON TRAIN—PROXIMATE CAUSE.—It is not necessary that a person should be on a train in order to be a passenger. A passenger who leaves a train to go to a refreshment room and returning to the train stands near it and while there is hit with a piece of burning wood carelessly thrown out by a brakeman is not guilty of negligence, and if the passenger afterwards die from the injuries received the railroad company is liable. There was a trial by a jury, a verdict for the plaintiff for \$2333.35, a motion for a new trial made by the defendant overruled, and final judgment rendered for the plaintiff for the amount of the verdict.

The points decided are stated in the above paragraphs. Judgment for plaintiff affirmed. **T. A. HENDRICKS, O. B. HORD and A. W. HENDRICKS**, appeared for appellant; **A. G. PORTER, B. HARRISON and C. C. HINES**, for appellee. *Supreme Court, Indiana, May 1872. Jeffersonville, Madison & Indianapolis R. R. Co. v. Riley, 39 Ind. 568.*

INJURED AT STATION—DUTY TO KEEP PLATFORM LIGHTED.—In **LOUISVILLE, NEW ALBANY & CHICAGO R'y Co. and TOLEDO, ST. LOUIS & KANSAS CITY R'y Co. v. TREADWAY**, 143 Ind. 689 (1895), it appeared that plaintiff, while waiting for a train at a railway station, had occasion to respond to a call of nature, and there being no closets provided at the depot, she retired from the platform. On her return she was injured by stepping off the platform in the darkness. Trial resulted in verdict and judgment against both defendants. On appeal, *held* that railway company was liable for failing to keep its station and platform properly lighted for the safety of passengers. *Held* also, that where two railroad companies use the same depot and platform, and a person enters upon the premises in the night time to take passage on a train of one of the companies, no duty to light is owing to such passenger from the other company. Judgment against the Louisville, etc., R. Co. (commonly called the "Monon") affirmed and that against the Toledo, etc., R'y Co. (commonly called the "Clover Leaf") reversed. Petition for rehearing denied. (This case is also reported in 142 Ind. 475, but the official syllabus appears to have been inadvertently omitted in that report.)

ANDERSON ET AL. V. SCHOLEY.

Supreme Court, Indiana, November Term, 1887.

[Reported in 114 Ind. 553.]

OVERTURNING OF STAGE COACH—PRESUMPTION OF NEGLIGENCE.—Where the complaint alleged the existence of the relation of passenger and carrier between plaintiff and defendants, and that plaintiff was injured by the overturning of the defendant's coach in which he

was travelling, it was held that the relation of carrier and passenger having been established, the fact of the overturning of the coach made a *prima facie* case of negligence against the carrier.

DRIVER OF COACH.—It was the duty of the defendants to supply the coach with a driver who knew the way himself, and would not be controlled by the suggestion of a passenger, and they cannot be relieved of liability by showing that the passenger directed the driver by which the latter was led off the roadway.

FROM the Dearborn Circuit Court. The facts appear in the opinion. *Judgment affirmed.*

N. S. GIVAN and S. H. STEWART, for appellants.

J. B. COLES, G. M. ROBERTS and C. W. STAPP, for appellee.

Mitchell, Ch. J. — This was an action by William Scholey against Mason W. Anderson and Timothy McHenry to recover damages for an injury sustained by the overturning of a stage coach in which the plaintiff was being carried as a passenger, and of which Anderson and McHenry, who were partners, were the proprietors.

The complaint charges that the defendants undertook to carry the plaintiff from the city of Aurora to Rising Sun on the evening of the 15th day of January, 1885, and that by reason of the negligence of the defendants in failing to provide lights, the night being dark, so as to enable the driver to see and keep in the road, and by providing unreliable horses, and a negligent and inefficient driver, the vehicle was upset, whereby the plaintiff was severely injured.

The defendants answered the general issue, and specially, by way of accord and satisfaction, that, before the bringing of the suit, by agreement between the plaintiff and defendants, the latter had paid the charges of the physicians for their services in waiting upon the plaintiff after he had received the injuries complained of, and had, also, permitted him to ride in their coaches from Rising Sun to Aurora and return free of charge, which payment of the physicians' bills and riding free of charge had been accepted by the plaintiff in full satisfaction of all liability of the defendant on account of the injuries complained of.

Without demurring to the special answer, the plaintiff replied in denial, and upon trial by a jury, the latter had a verdict in his favor. From the judgment which followed, this appeal is prosecuted.

On behalf of the appellants, it is first contended that there is no connection shown between the particular acts of negligence charged and the injury complained of, and hence that the court erred in overruling the demurrer to the complaint. The point is not well made.

The gravamen of the complaint is, that, while the relation of passenger and carrier existed between the plaintiff and the defendant, the former was injured by the negligent overturning of the vehicle in which he was being carried. The relation of carrier and passenger having been established, the fact that the passenger sustained an injury by the overturning of the carriage made a *prima facie* case of negligence against the carrier.

The carrier then assumed the burden of showing that he used reasonable and practicable precaution in providing a sufficient conveyance, together with safe horses, and other suitable and proper appliances for the journey, and that the driver was qualified for the position, and that he acted with reasonable skill and caution; in short, it became the duty of the carrier to rebut the presumption of negligence which arose from the happening of the accident, by showing that the injury was not occasioned by any want of skill or diligence on the part of the driver, or by any neglect or want of practicable care or foresight on the part of the carrier. *Cleveland, R. R. Co. v. Newell*, 104 Ind., 264, 54 Am. R. 312, and cases; *Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381; *Louisville, etc., R. Co. v. Pedigo*, 108 Ind. 481; *Stokes v. Saltonstall*, 13 Pet. 181 (1).

The omission to state just how the defendants' failure to supply the carriage with lights on a dark night, or to furnish safe and tractable horses and a careful and efficient driver, resulted in the overturning of the carriage did not make the complaint bad. They were not required to have produced the injurious result. It was the duty of the defendants to explain the causes of the accident, so far as they could, at least, as to show that it was not attributable to any omission on the part of the carrier, or on the part of the driver, who was their agent.

Concerning the contention that the evidence does not sustain the verdict, it is enough to say if the jury believed the plaintiff's testimony in relation to the occurrence, there can be no doubt but that the verdict is abundantly sustained. It is true the driver testified that he was in the road, pursuing the right track, and that he was pulled to the left, thereby upsetting the conveyance over the side, because the plaintiff told him repeatedly he was too far to the right. The plaintiff denied this. However the fact may be, it was the duty of the defendants to supply the coach with a driver who would not swerve the way for himself, and who would not be controlled by the

Stokes v. Saltonstall, 13 Pet. 181, is reported in 7 Am. Neg. Cas.

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suggestion of a passenger on the inside, while he occupied the seat charged with the duties and responsibility of driver.

So, in respect to the alleged compromise, while the plaintiff admitted that the defendants paid the expenses of the doctor for setting his shoulder, and that he had been permitted to ride gratuitously from Rising Sun to Aurora on several occasions, he denied that this had been done under an agreement to compromise his claim against the defendants for damages.

On the appellee's behalf it is insisted that the second paragraph of answer did not state sufficient to constitute a defense, and that even if the facts therein pleaded had been proved, the refusal to grant a new trial would not have constituted reversible error. However that might be, the jury manifestly found, upon the strength of the plaintiff's evidence, that they were not proved.

The plaintiff testified that the doctor's bill was paid by the driver and that he, plaintiff, promised at the time to repay him.

Some of the instructions given by the court to the jury are made the subjects of unfavorable comment. Without setting them out in detail, it is only necessary to say they relate for the most part to the degree of care the law exacts of a carrier of passengers.

The jury were told, in one of the instructions to which objection is made, that a company or corporation, or one or more persons engaged in transporting passengers for hire from one point to another, constituted such company, corporation or person a common carrier of passengers, and that the omission of any reasonably practicable precaution tending to insure the safety of passengers, was such neglect as would make a common carrier liable to a passenger who was injured therefrom without fault.

There was nothing objectionable in this instruction, nor was there in any of the others in which the court defined the duties of carriers of passengers.

Relevant to the plea of accord and satisfaction, and the evidence pertaining thereto, the court instructed the jury to the effect that if the plaintiff had agreed to accept payment of his doctor's bill, and the right to ride in the defendants' coaches, for a fixed time, free of charge, in full satisfaction of his claim for damages, then he would not be entitled to recover, provided the agreement had been executed.

The doctrine is elementary, that, in order to make out the defense of accord and satisfaction, it must be shown that the agreement to accept something of value in satisfaction of the liability incurred

has been fully executed, and that the thing to be so taken has been accepted and received. *Jackson v. Olmstead*, 87 Ind. 92; *Deweese v. Cheek*, 35 Ind. 514.

We have examined the other instructions complained of, and find them correct, within the principles heretofore expressed in this opinion.

It is the duty of the court in cases like the present to instruct the jury whether or not a given state of facts, if established by a preponderance of the evidence, may or might constitute negligence. *Woolery v. Louisville, etc., R. Co.*, *supra*. The instructions given by the court were consistent with this rule.

The appellants complain because the court, upon objection, refused to permit them to ask the plaintiff whether the defendants' coaches had been supplied with lights prior to the accident complained of. It is assumed that if the defendants habitually used coaches to which no lights were attached, and the plaintiff knew the fact when he became a passenger, he took the risk, and would have no right to complain. This position is not maintainable.

It is the carrier's duty to make reasonable provision for the safety of the passenger, and the former is supposed to know better than the latter what precautions are necessary to enable him to execute his undertaking. While the carrier is not an insurer of the sufficiency of his appliances, he does in effect insure those whom he undertakes to carry that he has not neglected any reasonable precaution necessary to make the journey safe. Unless, therefore, the instrumentalities provided by the carrier are so glaringly defective as to make it apparent to every prudent person that they are insufficient, and that the journey could not be taken with safety, the passenger may rely upon the care and foresight of the carrier. *Radbury v. Goodwin*, 108 Ind. 286.

The court excluded testimony offered by the appellants tending to show that they had instructed their drivers to carry the plaintiff free of charge after the accident. The instructions given by the defendants to the drivers of their coaches, in the absence of the plaintiff, did not tend, in any proper manner, to prove any fact in issue. We find no error.

The judgment is affirmed, with costs.

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CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. MONEYHUN.

Supreme Court, Indiana, October, 1896.

[Reported in 146 Ind. 147.]

STANDING ON STEPS OF CAR—SICK PASSENGER—CONTRIBUTORY NEGLIGENCE.—In an action to recover damages for injuries sustained by a sick passenger the special verdict showed that a boy, fifteen years of age, was a passenger on defendant's train; that he was in a coach filled with passengers and was obliged to stand in the aisle; that after being in the car some time he became sick, and feeling that he would have to vomit, he voluntarily left the car and went upon the steps leading to the ground, and while on the lower step the car gave a sudden jerk and he was thrown to the ground; that there was room for him in the car to ride and that he would not have been injured if he had remained there, and that "it was not a safe place to stand where he did, even if the train ran smooth and did not jerk." *Held*, that the facts found by the special verdict showed contributory negligence.

APPEAL from the Madison Superior Court. The facts appear in the opinion. *Judgment reversed.*

JOHN T. DYE, LOVETT & RYAN and ELLIOTT & ELLIOTT, for appellant.

GOODYKOONTZ & BALLARD, for appellee.

Jordan, J.—This action was commenced and prosecuted in the lower court by appellee, William T. Moneyhun, as guardian of Charles Moneyhun, a minor under the age of 21 years. The action arises out of injuries sustained by said ward, while a passenger upon a train of cars operated by the appellant, by reason of the alleged negligence of the latter.

Upon the trial there was a special verdict returned by the jury, and upon the facts therein found the court adjudged that appellee was, as such guardian, entitled to recover damages for the said injuries for the benefit of the ward, and rendered judgment accordingly against appellant for \$5,000, the amount mentioned in the verdict. The legal propositions submitted by the parties to this appeal arise under the facts embraced in the special finding of the jury. The following facts are all which we deem it necessary to set out in order to present the mooted questions of law herein involved:

Appellee is the father and the duly appointed guardian of Charles

Moneyhun; the latter having no estate, either real or personal. This ward at the time he sustained the injuries in question was a boy of average size, intelligence and education for one of his age, being at the time nearly 15 years of age. On June 9, 1895, after advertising the same, the railroad company (appellant herein) ran an excursion train over its road from Anderson, Ind., to Benton Harbor, Mich., and return; the train being composed of two sections, and the cars thereof being vestibuled. Appellee's ward, Charles Moneyhun, with the knowledge and consent of his father, purchased a ticket and boarded said train as a passenger, at Anderson, for the purpose of being carried as such to Benton Harbor. He entered one of the coaches of the second division and seated himself therein. When said train arrived at Alexandria, a station about 12 miles from Anderson, the coach in which said Moneyhun was seated was detached from the train and left upon a side track, because of a hot box, which was occasioned by reason of the box being worn and not properly packed. The passengers in this coach, including young Moneyhun, were informed by the conductor in charge of the train that they must leave this car and go into others. On entering the car to which he and other passengers had been transferred, he found all of the seats occupied and the aisle thereof and other places therein filled with passengers, who were standing, and he was unable to find a seat upon the train, and for this reason accepted standing room in the car which he entered. After detaching the car from the train for the reason stated, appellant did not replace it by another in order to accommodate the passengers on the train with seats. Moneyhun, after standing in the aisle of the car until the train was near the city of Warsaw, Ind., became sick. What made him sick, however, is not disclosed by the verdict. Believing that he would be compelled to vomit, by reason of nausea, and in order to avoid soiling the car and persons standing near him, he voluntarily left the car in which he was riding, and passed out through the door of the vestibule, and went down on the lower step of the steps, leading from the ground to the car, and stood upon this lower step for a short time, holding to the railing. While so standing upon this step, his back was towards the platform of the car, and his head was leaning forward and outward. The train at the time he left the car, and while he was standing upon said step, was running at a speed of 25 miles per hour; and while so standing he was thrown off the train, by reason of the engineer suddenly, unnecessarily, and without warning, applying steam, which caused the car to give a sudden jerk.

By being thrown from the train in the manner stated, Moneyhun was severely injured, being the same injury complained of by appellee. The jury also find that there was ample room in the car where he was for him to ride, without going upon the platform or steps, and, had he remained upon the inside of the coach in which he was riding, he would not have been injured; that it was not safe, but dangerous, for him to leave the car and "go on to and stand upon the car step," as he did, while the train was running at the rate of 25 miles per hour. The jury further found that "it was not safe for a person to stand where he did, even if the train ran smooth and did not jerk."

The cars were so vestibuled as to render it safe for a passenger to pass from one car to another, and on the car door there was a printed notice forbidding passengers to ride upon the platform of the car, but, owing to the door being at the time swung back, it was thereby obscured from view. The injuries sustained by appellee's ward consisted of several fractures of both the right and left leg, and dislocation of his left ankle. These injuries were found to be permanent.

The inquiries arising under the above facts embraced in the special verdict are those which usually arise under the issues in actions based upon negligence: First, is the injury in question the result of negligence of appellant? Second, is the ward of appellee chargeable with contributory negligence? At the very threshold of these questions counsel for appellant challenge the right of the guardian to maintain this action, upon the ground that it could be brought only in the name of the infant, by his next friend, under sections 256, 257, Rev. St. 1894 (sections 255, 256, Rev. St. 1881). Section 29 of the Code of 1881 (section 267, Rev. St. 1894, and section 266, Rev. St. 1881), provides that "a father, or, in case of his death or desertion of his family, or imprisonment, the mother may maintain an action for the injury or death of a child, and the guardian for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward."

In the case of Louisville, etc., R'y Co. v. Goodykoontz, 119 Ind. 111, this court, on page 113, interpreted this section as follows: "If a minor under guardianship sustains an injury to his person from the wrongful conduct of another, his guardian may maintain an action and recover for the benefit of his ward precisely as the latter might have recovered through the intervention of a prochein,

and in case he had not been under guardianship. This is so whether the ward's father or mother be living or not. The pain and suffering endured and the permanent injury resulting from the wounding or maiming of a minor are personal to himself, and damages for such pain and injuries are always recoverable for his benefit."

We yield adherence to the above interpretation of the statute, and are of the opinion that it clearly authorizes a guardian of an infant who has received a personal injury as the result of a wrongful act of omission or commission by another to sue and recover from the wrong-doer such damages as are personally sustained by his ward. The contention of appellant upon this proposition must, therefore, be denied, and the action of the appellee in instituting this suit as the guardian of the injured minor is sustained.

The special verdict does not find that the ward of appellee was without fault or free from contributory negligence upon his part, at the time the injury occurred. As freedom from fault or negligence at the time of the accident upon the part of the latter is an essential factor which must exist in order to entitle the appellee to recover in this action, we may, therefore, assume, without deciding, that appellant, under the circumstances, is chargeable with actionable negligence, and address our inquiry first to the question of contributory negligence, which counsel for appellant so strenuously insist, under the facts, must be imputed to appellee's ward. It is conceded by appellee that under the facts his ward must be deemed to have been, at the time he sustained the injury, capable of being guilty of contributory negligence. The absence of contributory negligence upon the part of the injured party at the time he received his injuries was in issue, as well as the alleged negligence of the appellant, and the burden rested upon the appellee to establish, *inter alia*, both of these requisite facts before he would be entitled to a recovery. The rule is firmly settled that, if the special verdict of the jury or a special finding of the court omits to find any fact essential to support the judgment below, the latter cannot be sustained. No presumptions or intendments are available in favor of a special verdict, and the omission to find a fact in favor of the party upon whom the *onus* of proving it is cast is equivalent to finding such fact against him. As a legal rule, that which is not proven is the same as that which does not exist. See *Houseworth v. Bloomhuff*, 54 Ind. 487; *Buchanan v. Milligan*, 108 Ind. 433; *Town of Albion v. Hetrick*, 90 Ind. 545; *Dixon v. Duke*, 85

Ind., 434; *Vinton v. Baldwin*, 95 Ind. 433; *Improvement Co. v. Loehr*, 124 Ind. 79; *Mitchell v. Brawley*, 140 Ind. 216; 2 Elliott, Gen. Prac. § 933.

It is also a well-settled proposition in this State that whenever, under the facts disclosed by a special verdict, the question is presented whether as to the negligence of the defendant, or as to whether the plaintiff was without fault, and two inferences may reasonably be drawn as to either of said ultimate facts—one in favor and the other against—then the determination of such fact is within the province of the jurors, and their finding will be accepted by the court as controlling. *Ohio, etc., R'y Co. v. Collarn*, 73 Ind. 261; *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39; *Rush v. Mining Co.*, 131 Ind. 135; *Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381; *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Louisville, etc., R. R. Co. v. Costello*, 9 Ind. App. 462; *City of Bloomington v. Rogers*, 13 Ind. App. 121.

But, if the facts found are such that the court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, then the finding of such ultimate fact, whatever it may be, will be disregarded by the court. *Smith v. Wabash R. R. Co.*, *supra*.

In the case at bar, however, there is but one reasonable inference to be deduced from the facts relative to the acts of appellee's ward at the time he sustained his injuries, and that is to the effect that his own negligence contributed to said injuries; hence a finding by the jury that he was free from fault could not have affected the legal result. It is manifest, we think, from the facts shown, that the ward of appellee was thereunder chargeable with contributory negligence. While it is true that it was a duty incumbent upon the railroad company to furnish a seat within its car for each passenger taken aboard of its train, and not merely standing room in the aisle of the car, the mere fact, however, that he was compelled to accept standing room, would not justify him in voluntarily leaving a place of safety and going to one of peril. The jury found that there was ample room in the car in which he was riding, and in other cars upon the train, and that there was no necessity for him to go upon the platform or car steps, and that, had he remained inside of the car, he would not have sustained the injuries which he did; that it was unsafe and dangerous for him to leave the car when the train was running at the rate of 25 miles per hour, and stand upon the steps, as he was doing when the accident happened. The jury

further found that the place where Moneyhun stood when injured was not a safe place to stand, "even if the train ran smooth and did not jerk." He was not content to stop on the platform, but went upon the lower step and stood there with his back towards the platform and his head leaning outward, as it is expressly shown by the verdict. We are of the opinion that the facts disclose a clear and undoubted case of contributory negligence upon the part of appellee's ward, which cannot be controverted from any legal standpoint. While it may be said, in the sense of decency, that it was proper for this boy, when admonished of the fact that he was about to vomit, to make an effort to avoid befouling his fellow passengers, yet even under this view the law would not justify him in exposing himself to peril, or excuse or mitigate his negligence when he seeks redress in an action for injuries sustained. The authorities cited by the learned counsel for the appellee are, under the facts, distinguishable from the case at bar, and lend but little if any support to his contention upon the question involved.

The conclusion reached is in harmony with and supported by the following authorities: *Goodwin v. Boston, etc., R. R. Co.*, 84 Me. 203, 24 Atl. 816; *Worthington v. Central Vt. R. Co.*, 64 Vt. 107, 23 Atl. 590, 15 L. R. A. 325; *Camden, etc., R. Co. v. Hoosey*, 99 Pa. St. 492; *Fisher v. West Va. R. R. Co.*, 39 W. Va. 366, 19 S. E. Rep. 578, 23 L. R. A. 758; *Ala., etc., R. R. Co. v. Hawk*, 72 Ala. 112; *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. Rep. 331; *Paterson v. Central, etc., R. R. Co.*, 85 Ga. 653, 11 S. E. Rep. 872; *Bemiss v. New Orleans, etc., R. Co. (La.)*, 18 Southern Rep. 711; *Wendell v. New York, etc., R. Co.*, 91 N. Y. 420; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. Rep. 282; *Wallace v. New York, etc., R. Co.*, 165 Mass. 236, 42 N. E. Rep. 1125; *Krenzer v. Pittsburgh, etc., R. Co. (Ind. Sup.)*, 43 N. E. Rep. 649; *Lewis v. Balt., etc., R. Co.*, 38 Md. 588; *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Reynolds v. New York, etc., R. Co.*, 58 N. Y. 248; *Lofdahl v. Minn., etc., R. Co.*, 88 Wis. 421, 60 N. W. Rep. 795; *Butler v. Pittsburgh, etc., R. R. Co.*, 139 Pa. St. 195, 21 Atl. Rep. 500; *Ecliff v. Wabash R. Co.*, 64 Mich. 196, 31 N. W. Rep. 180; *Patt. Ry. Acc. Law § 272*; *Cincinnati, etc., R. Co. v. McClain (Ind. Sup.)*, 44 N. E. Rep. 306; *St. Louis, etc., R. Co. v. Rice (Tex. Civ. App.)*, 29 S. W. Rep. 525; *Scheiber v. Chicago, etc., R. Co.*, 61 Minn. 499, 63 N. W. Rep. 1034; *Chicago, etc., R. Co. v. Carroll*, 5 Brad. (Ill. App.) 201; *Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125. It follows that the court erred in denying the appellant's motion for judgment in its favor on the special verdict.

The judgment is therefore reversed and the cause remanded, with instructions to the lower court to sustain this motion and render judgment upon the special verdict in favor of appellant.

Among the cases in the *Indiana Appellate Courts* relating to Personal Injuries sustained on Trains, Station Platforms, etc., are the following:

Boy injured on station platform:

In **NEW YORK, CHICAGO & ST. LOUIS R. R. Co. v. MUSHRUSH**, 11 Ind. App. 192 (1894), plaintiff sued to recover damages for the death of his minor son, aged twelve years, who went to the depot to meet his sister who was expected to arrive on a train due at Hammond about seven o'clock in the evening. As the train was starting the boy, while walking along the platform, stumbled and fell over some blocks and other obstructions upon the platform which he could not and did not see, and was thrown under the wheels of the car and killed. Negligence charged in permitting said obstructions to be upon said platform and failure to have the platform properly and sufficiently lighted. Trial in the Porter Circuit Court resulted in verdict and judgment for plaintiff for \$1,000. On appeal it was held that it was not necessarily negligent for the boy to walk slowly along the platform, within a foot and a half of the train moving at the rate of two miles an hour. Nor was he necessarily a trespasser because he failed to leave the platform and take the shortest route home. It was the duty of the railway company to keep its station and station platform in a reasonably safe condition and to have them reasonably well lighted, and for failure to do this is answerable to its passengers, and this duty applies not only to passengers but to those who come to meet friends or see them safely off. Judgment affirmed.

Girl injured on street car:

EVANSVILLE STREET R'y Co. v. MEADOWS, 13 Ind. App. 155 (1895), was an action for damages for injuries sustained by plaintiff, a girl, ten years old, who was thrown from a street car by a sudden jerk of the car. Judgment for plaintiff. On appeal the court held that where a driver of a street car invited a child to ride upon the car, and the child while upon the car was injured by the mules attached thereto giving the car a violent jerk, while the driver had temporarily abandoned the lines and left them hanging loosely on the brake, the injury was one for which damages might be recovered. Judgment affirmed.

Person not passenger:

In **STALCUP v. LOUISVILLE, NEW ALBANY & CHICAGO R'y Co.**, 16 Ind. App. 584 (1896), it was held that a person who rides on a railroad train, free of charge, by the "invitation and permission of the conductor," is not a passenger so as to entitle him to recover for injuries received. Held also, that a person on a railroad train,

performing labor without recompense, with the "acquiescence, knowledge, consent and permission of the conductor and all other persons running and conducting the train," is not a servant toward whom the railway company owes any legal obligation; it not being shown that the conductor and others in charge of the train were authorized to employ such person. Plaintiff, while riding on the defendant's train, with the conductor's permission, was injured by reason of the train falling through a bridge into the river. Trial resulted in judgment for the railway company, which, on appeal, was affirmed, in accordance with the above ruling.

Injured on freight train:

IN INDIANA, ILLINOIS & IOWA R. R. Co. v. MASTERSON (Indiana Appeals, October, 1896), 44 N. E. Rep. 1004, where plaintiff was injured while a passenger on defendant's freight train, due to violent jerking of the train, whereby she was thrown to the floor of the car, it was held that a passenger in leaving her seat to get a drink of water for her child was not, as matter of law, guilty of contributory negligence; nor could she be assumed to take the risks flowing out of the negligent operation of the air brake by defendant's employees. The proximate cause of the injury was the sudden and violent jerking of the caboose caused by the improper use and application of the brake by defendant's employees. Judgment for plaintiff affirmed.

FALLING OFF STATION PLATFORM ON DARK NIGHT—CONTRIBUTORY NEGLIGENCE—DAMAGES.—Appeal by the railway company from judgment for plaintiff for \$10,000, rendered in the United States Court for the Northern District of the Indian Territory in an action to recover damages for personal injuries alleged to have been inflicted upon appellee by the negligence of appellant. On January 30, 1892, appellant's railroad crossed the road of the Choctaw Coal and Railway Company at South McAlester, Indian Territory. South McAlester was at that time a town of about 600 inhabitants, and a seat of the United States Court for the Indian Territory, to which many persons were required to go. At the junction of the two roads in South McAlester appellant had a platform at which all of its passenger trains except the train known as the "Flyer" stopped, and received passengers and the mail. This platform extended north and south along the east side of appellant's railroad, and was about 8 feet wide and 200 feet long. People expecting to become passengers on appellant's trains stood about on the platform until the train arrived. There were no passenger depot or other buildings at this point. The platform was not lighted, nor was there any railing of any kind about it. On the night appellee claims to have been injured, she and her sister and the latter's two children went to the platform shortly before midnight to take appellant's south-bound passenger train. They stepped upon the platform at the north end, which is nearly even with the ground. Appellee testified that after

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stepping upon the platform she stood up for about ten minutes; that it was a cold, dark night, without a moon and with drizzling rain falling; that, unnoticed by her, her sister sat down on the side of the platform, and took her little boy in her lap; that the little daughter of appellee's sister, being cold, asked appellee to take her in her lap; that appellee thought her sister had stepped off the platform and sat down on the side of it, and that she could do the same; that she looked down to see, and thought she could see the ground; that she attempted to step down about three feet from her sister; that when she stepped down she just went on; that she thought her sister had stepped off and set back and that she thought she was going to do the same, and that she was positive she saw the ground, and was going to step on it; that when she stepped she went down about four feet. Appellee was a resident of the State of Texas. She had gotten off of appellant's train at this platform once before, but the testimony does not show that it was under circumstances to acquaint her with the height of the platform from the ground at the point at which she was injured. The court, after stating the facts, in the course of its opinion, said: "Appellant strenuously insists that the trial court erred in not directing a verdict for it upon the ground that the proof shows that appellee was guilty of contributory negligence in stepping off the platform. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is considered as one of law for the court. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. Rep. 140; *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905; *Dunlap v. Railroad Co.*, 130 U. S. 649, 9 Sup. Ct. Rep. 647; *Railway Co. v. Pounds* (Ind. Terr.), 35 S. W. Rep. 251. Tested by this rule appellant's contention cannot be sustained. Appellee was unacquainted with the structure of the platform. She was in the dark. She was, with her sister's children, who may be regarded as in some sense under her care, exposed to the cold and the rain and the weariness of standing. She had come upon the platform where it was nearly level with the ground. She had reason to believe that her sister had just stepped from the platform to the ground in safety. She looked to the ground and was positive that she saw it near enough to be reached by a step. For her own convenience and the protection of her sister's child from the weather, she essayed the step. We agree with the jury that prudent persons, exercising that care which the situation demanded, might have done likewise. It is clear that under the circumstances appellee's attempt, while really dangerous, was not obviously so. It was not seen to be dangerous, not because of appellee's failure to look, but because of appellant's failure to furnish proper lights for the platform. The attempt to sit down upon the platform was not the

necessary venture of a person already adequately provided for, at the natural endeavor to lighten discomforts, which resulted from the railroad's failure to furnish reasonable accommodations. This is fairly within the rule which makes a railway liable for injuries incurred by one in attempting, by an act not obviously dangerous, to remove a serious inconvenience to him, caused by the negligence of the railway. *Gee v. Railway Co.*, L. R. 8 Q. B. 161; *Railroad Co. v. Stanley*, 61 Md. 266 (2); *Patt. Ry. Acc. Law*, 2 Wood, R'y Law, p. 1087, § 301. We have carefully considered the cases relied upon by appellant in this connection, viz.: *Ed v. Railroad Co.*, 84 Va. 231, 4 S. E. Rep. 587 (3); *Forsyth v. Railway Co.*, 103 Mass. 510 (4); *Railway Co. v. Hodges* (Tex. Civ. p.), 24 S. W. Rep. 563; and *Bennett v. Railway Co.*, 57 Conn. 422, Atl. Rep. 668 (5), and find them distinguishable in essential facts from the present case. The case of *Railway Co. v. Neiswanger*, 21 S. E. Rep. 582, wherein the Supreme Court of Kansas affirmed a judgment for the plaintiff, presents many features of close resemblance to those involved herein (6).

It is further urged that a verdict for appellant should have been set aside, because, as claimed, appellant's complaint alleged a retrocession of the womb as the result of the injury, while the facts established an antiflexion. *Mansf. Dig., Ark.*, § 5075, provides: 'The variance between the allegation in a pleading and the proof is to be deemed immaterial, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, the fact must be shown to the satisfaction of the court, and it must be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just.' The uniform construction of this statute in Arkansas and in States where like provisions are in force is that, without proof to the satisfaction of the court that the party has been misled, the variance will be deemed immaterial, and treated accordingly. *Molen v. Orr*, 44 Ark. 486; *Place v. Minister*, 65 N. Y. 89; *Lin v. Gunter*, 11 N. Y. 368; *Blackman v. Wheaton*, 13 Minn. 299; *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. Rep. 316;

In *GEE v. METROPOLITAN R'Y*, 8 L. R., Q. B. 161, it appeared that a passenger by railway, without necessity for so doing, leaned against a carriage door, which flew open; he fell out and was injured: Held, there was evidence of the liability of the company to go to the jury. *semble*, when there is more than a scintilla of evidence of contributory negligence the court will not go into question of degree, that being for the jury.

2. Reported with the *Maryland* cases in this volume, page 422, *post*.

3. Reported with the *Virginia* cases in volume 10.

4. Reported with the *Massachusetts* cases, page 438, *post*.

5. See abstract of this case reported in this volume on page 158, *ante*.

6. See abstract of this case reported with the *Kansas* cases in this volume, page 372, *post*.

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Wells v. Sharp, 57 Mo. 56. Appellant having offered no proof that it was misled, the alleged variance, if indeed, it can be so termed, must be regarded as harmless.

"The charge of the court is assailed upon the ground that its effect was to make appellant an insurer of the safety of its platform and the adequacy of its lights, instead of requiring of it, in these particulars, ordinary care in view of the dangers to be apprehended. The charge, when considered in its entirety, does not bear the construction which appellant seeks to put upon it. The court, after telling the jury that it was the duty of appellant to furnish a safe platform said: 'When I say it was the duty of the railroad company to have furnished that platform, I mean that it was their duty to exercise ordinary care and prudence in maintaining that sort of platform; that is, that care and prudence which an ordinarily prudent man would have used with reference to his own business under like circumstances.' The court further said: 'It is also, and was also, the duty of this defendant at South McAlester to light that station place at night, at a reasonable time before the arrival of trains, in such a manner as to afford a safe place, by reason of such lights, for passengers who desired to take passage upon its trains; and when I say it was their duty I mean, as I said before, that they were held to the exercise of ordinary care and prudence in furnishing that light.' It may be further stated that the undisputed testimony establishes that appellant was guilty of negligence in the character of the platform which it maintained without lights on the night of the injury, and that upon this issue the jury could not properly have reached any other conclusion than the one returned by them. It follows, therefore, that if there were errors in the charge upon this question they were not prejudicial. This statement also disposes of numerous assignments of error predicated upon the refusal of the court to give requested charges defining the duty of appellant in the matter of depots, platforms and lights. A judgment will not be reversed on appeal for error when it plainly appears from the record that such error worked the complaining party no harm. *Sanger v. Flow*, 1 C. C. A. 56, 48 Fed. Rep. 152.

"It is urged that the court erred in refusing to instruct the jury as follows: 'The court instructs the jury that, if they find from the evidence in this case that the night in question was dark, and that said platform was not properly lighted, because of said darkness and a lack of lights, it is incumbent upon the plaintiff in this case, before she can recover, to show that she took greater care than she would have taken had the night been light and the platform unlighted.' There is no error in such refusal, because the effect of such instruction was to impose upon appellee the burden of showing that she was not guilty of contributory negligence. *Railroad Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. Rep. 239; *Railroad Co. v. Tobriner*, 147 U. S. 571, 13 Sup. Ct. Rep. 557 (1)."

1. *Washington & Georgetown R. Co. v. Tobriner* (Adm'r), 147 U. S. 571, is reported in *Harmon's* 7 Am. Neg. Cas. 359-368.

On the question of damages the court thought the amount of the verdict excessive, and modified the same by affirming the judgment if plaintiff remitted the sum of \$5,000. In the event of remittitur judgment for \$5,000 was affirmed. C. L. JACKSON, appeared for appellant; R. SARLLS and GEO. E. NELSON, for appellee. *Court of Appeals, Indian Territory, September, 1896. Missouri, Kansas & Texas Railway Co. v. Turley, 37 S. W. Rep. 52.*

PASSENGER INJURED IN OVERTURNING OF STAGE COACH — RES GESTÆ — CARRIERS — INSTRUCTION — DAMAGES.—In an action to recover damages for injuries sustained by the upsetting of a stage coach, plaintiff recovered judgment for \$270, from which defendants appealed. On appeal it was held not error to permit a question bringing out plaintiff's declaration as to what he said at the time of the accident as to the injuries he had received, the declaration being part of the *res gestæ*. As to error in instruction the Supreme Court said: "It is objected that the court erred in giving the following instruction, as requested by the plaintiff below: 'That the proprietors of stage coaches which ply between different places, and carry passengers for hire and compensation, are responsible for all accidents and injuries happening to the persons of the passengers, which could have been prevented by human care and foresight.'

"This instruction contemplates a great degree of diligence, care and foresight on the part of stage proprietors, but not more, we think, than sound public policy dictates, nor more than the authorities justify. It was held in *Maury v. Talmadge*, 2 McLean, 157, that stage proprietors are bound to use the greatest care for the safety of passengers; that the least negligence by the drivers, or the want of skill, makes them liable. So in *McKinney v. Neil*, 1 McLean, 540 (1), it is decided that a stage proprietor is bound to furnish good coaches, gentle and well broke horses, good harness, and a prudent, skillful driver; and is liable to any passenger who may receive any injury from any defect in these particulars; and is also liable for the smallest degree of negligence, carelessness or want of skill in the driver. With horses gentle and well broke, with coaches and harness good and strong, with drivers sober, prudent and skillful, a stage coach line might be regarded as managed with human care and foresight. With such an outfit, stage proprietors, in a level prairie country like Illinois and Iowa, would rarely, if ever, be called upon to pay damages for personal injuries to passengers. In *McKinney v. Neil*, 1 McLean, 540, the upsetting of a stage coach was held to be *prima facie* evidence of negligence. That doctrine is especially appropriate to a level prairie country, where nearly every accident may be traced to drunken or grossly careless drivers. The instruction under consideration is

1. *McKinney v. Neil*, 1 McLean, 540, is reported in 7 Am. Neg. Cas. 612.

quite as moderate towards stage proprietors as the authorities would justify. It appears to have been extracted almost literally from elementary works, as the settled doctrine of modern decisions. Story on Bailm., sec. 601. 2 Greenl. Ev., sec. 221; Angell on Carriers, secs. 536, 568 and notes." As to errors in reference to the true measure of damage, the court said: "These may all be sufficiently comprised under one proposition, which was submitted by defendants below. They requested the court to instruct the jury that, no matter whether they believed the driver to be drunk or sober, the plaintiff is only entitled to the actual damage proved; and that he cannot recover exemplary damages unless he proves the acts of the defendants to have been intentional and designed. This doctrine the court refused to submit to the jury as law. Upon this point we have some difficulty in arriving at a conclusion. If Professor Greenleaf's definition of damages is to be taken as the uniform test, applicable to all cases, then we should say that defendants submitted a correct proposition, which should have been given to the jury. Greenleaf declares, that: 'Damages are given as compensation, recompense, satisfaction to the plaintiff for the injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less.' 2 Greenl. Ev., sec. 253. This doctrine in reference to damages cannot be universal in its application. It is not appropriate to all cases and to all kinds of damages. It is not applicable to exemplary damages, nor to all cases where damages cannot be ascertained by actual computation. * * * In a case of gross negligence on the part of a stage proprietor, such as the employment of a known drunken driver, and where a passenger has been injured in consequence of such negligence, we think exemplary damages should be entertained. * * * If a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where an 'intent or design' to do the injury does not appear. The reason and necessity for this rule is becoming yearly more apparent. The consequences of such negligence on the part of carriers, is becoming more and more appalling. The alarming increase of railroad, steamboat and stage disasters, the frightful destruction of life, and limbs and property, call loudly for a strict enforcement of the most exemplary rules in reference to common carriers. If a stage proprietor employs a driver known to be drunken and careless, a more severe measure of damage should be awarded to the injured party, than in a case where some degree of care and diligence had been exercised by the proprietor. This principle appears to be favored in *McKinney v. Neil*, 1 McLean, 540. It was held that the passenger need show nothing more than that the injury was occasioned by the upsetting of the stage coach, in order to sustain his action. It will then be incumbent on the defendant to show by way of reducing the damages, or in bar of the action, the circumstances of the case. We conclude, then, that in refusing the instructions referred to under

this head, the court did not err." Judgment affirmed. SMITH, MCKINLEY and POOR, appeared for appellants; COOK and DILLON and WM. G. WOODWARD, for appellee. Opinion by GREENE, J. *Supreme Court, Iowa, 1854. Frink & Co. v. Coe, 4 G. Gr. (Iowa) 555(1).*

SALES V. THE WESTERN STAGE COMPANY.

Supreme Court, Iowa, 1857.

[Reported in 4 Iowa, 547.]

STAGE COACH PROPRIETORS—CARRIERS OF PASSENGERS.—

It is the duty of stage proprietors, who run a line of coaches for the conveyance of passengers, to provide good coaches, harness and horses, and good, skillful and careful drivers; and should they fail to do so, and their passengers are injured by such failure they are responsible. Carriers of passengers for hire are not only to furnish good coaches, harness and horses, and skillful and careful drivers, but they are to keep them in good repair, and to see that their drivers drive with the *utmost* skill and prudence. They are bound to exert the *utmost* skill and prudence, in conveying their passengers, and are responsible for the *slightest* negligence or want of skill, either in themselves or their servants. They are bound to use such care and diligence, as a most careful and vigilant man would observe, in the exercise of the *utmost* prudence and foresight.

APPEAL from the Van Buren District Court.

Action brought to recover damages for an injury sustained by plaintiff, by the upsetting of a stage coach in which he was a passenger, and of which the defendants were the proprietors. On the trial, certain instructions were given, to which defendants excepted, and the verdict and judgment being against them, they now appeal. *Judgment affirmed.*

CLINTON & FISHER and KNAPP, CALDWELL & WRIGHT, for appellants.

C. NEGUS, for appellee.

Wright, Ch. J. — Various exceptions were taken to the decisions and proceedings of the court below, but appellants now expressly waive all other errors and seek to reverse this case, upon the single ground that the rule given to the jury, as to the care,

1. *Frink v. Coe, 4 G. Gr. (Iowa) 555*, is cited in *Russ v. Steamboat War Eagle, 14 Iowa, 363, 9 Am. Neg. Cas. 326, post*; *Moore v. Des Moines & Fort Dodge R'y Co., 69*

Iowa, 491, 9 Am. Neg. Cas. 334, post; *Pershing v. Chicago, B. & Q. R'y Co., 71 Iowa, 561, 9 Am. Neg. Cas. 346, post*.

skill and diligence required of them, as carriers of passengers for hire, was incorrect, and not warranted by the authorities. The instructions objected to, are as follows: "It is the duty of stage proprietors who run a line of coaches for the conveyance of passengers, to provide good coaches, harness and horses, and good, skillful and careful drivers; and should they fail to do so, and their passengers are injured by such failure, the proprietors are responsible. They are not only to furnish good coaches, harness, horses, and skillful and careful drivers, but they are to keep them in good repair, and are to see that their drivers drive with the *utmost* skill and prudence. Carriers of passengers for hire are bound to exert the *utmost* skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill either in themselves or their servants. They are bound to use such care and diligence as a most careful and vigilant man would observe, in the exercise of the *utmost* prudence and foresight."

It is objected, that by the use of the words "*utmost*" and "*slightest*," too high a degree of diligence and care is required of this class of carriers. A brief examination of the authorities, however, will show most conclusively, that the rule laid down, is well sustained by the earlier as well as later cases. We need do nothing more than refer to a few of them. What is said, as to the duty of such carriers, to furnish good coaches, harness and horses, and of their being required to keep them in repair, and of their further duty to furnish good and skillful drivers, is taken, almost word for word, from the case of *McKinney v. Neil*, 1 McLean, 550 (1), in which this language will be found: "He [the stage proprietor] is bound to provide good coaches, and harness, gentle and well broke horses, and a skillful and careful driver. These are obligations which the law imposes on every stage proprietor; and if any injury is received by a passenger from any defect in this preparation, the proprietor is responsible." To the same effect are the following, among other authorities: Story on Bailments, secs. 592, 593; *Crofts v. Waterhouse*, 3 Bing. 314 (2); Angell on Carriers, secs.

1. *McKinney v. Neil*, 1 McLean, 550, is reported in 7 Am. Neg. Cas. 612.

2. In *CROFTS v. WATERHOUSE*, 3 Bing. 314, 319, it appeared that the driver of a stage coach gathered a bank, and upset the coach. He had passed the spot where the accident

happened twelve hours before, but in the interval a landmark had been removed. In an action for an injury sustained by this accident, the judge told the jury that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been

534, 535, 540; *Peck v. Neil*, 3 McLean, 22; *Stokes v. Saltonstall*, 13 Pet. 181 (1); 2 Kent, 601; 2 Greenl. Ev., sec. 221; *Ingalls v. Bills*, 9 Met. 1. Again, while the common carrier of goods and chattels is held liable for all damages which do not fall within the excepted cases of the act of God and the public enemy, the carrier of passengers is not held responsible to the same extent, so far at least as relates to the persons of his passengers, but he is bound to the *utmost* care and diligence of very cautious persons, and is responsible for any, even the *slightest* neglect. Story on Bailments, sec. 601; *Christie v. Griggs*, 2 Camp. 79 (2); Angell on Carriers, 568, 570; *Stokes v. Saltonstall*, 13 Pet. 181; *Boyce v. Anderson*, 2 Pet. 155. A few extracts from these authorities, will suffice to show how uniform and well settled the rule is upon this subject.

In reference to the duty of such carriers in respect to the character and competency of their servants, there is an entire correspondence between the English and American authorities, and this duty is thus laid down in 3 McLean, 22: "He that establishes a line for the conveyance of passengers, and who holds out inducements to persons to travel in his vehicles, for which compensation is charged, is bound to have skillful and prudent drivers, and the *utmost* skill and prudence of the driver must be exercised to avoid accidents." And see *Crofts v. Waterhouse*, 3 Bing. 321; *Farwell v. B. & W. R. R. Co.*, 4 Met. 49; *Carpue v. London & B. R'y Co.*, 5 A. & E. 747 (3). So in Angell on Carriers, sec. 568, it is said,

occasioned by his deviation, the plaintiff was entitled to a verdict; and a verdict having been returned accordingly, the court granted a new trial on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence.

1. *Stokes v. Saltonstall*, 13 Pet. 181, is reported in 7 Am. Neg. Cas. 297.

2. In *CHRISTIE v. GRIGGS*, 2 Camp. 79, an action against a proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt, it was held, to prove negligence, it is *prima facie* enough to give evidence of the coach having broken down; from

which negligence will be presumed.

3. The facts in *CARPUE v. LONDON & BRIGHTON R'y Co.*, 5 Ad. & E. (Q. B.) 747, were: A railway company was empowered to make a railway, which all persons were to have the liberty of using with carriages, on payment of tolls. The company was also empowered to provide locomotive engines, and charge for their use, and to use locomotive engines and carriages for the conveyance of passengers, and to charge for such conveyance, in addition to the tolls, within a limited amount. It was enacted that no action should be prosecuted against any person, for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers given by

that the nature of their undertaking is to carry safely and securely, and though they do not impliedly warrant the safety of passengers at all events, yet they are bound to the *utmost* care and skill in the performance of their duty. The term here used expresses the idea of something beyond *ordinary* care. The degree of their responsibility, therefore, is not *ordinary* care, which will make them liable for only *ordinary* neglect, but *extraordinary* care, which renders them liable for *slight* neglect.

So Barbour, J., in *Stokes v. Saltonstall*, 13 Pet. 181, says, the stage proprietor must have a driver of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he is engaged. Such driver must act with the *utmost* prudence and caution; and if an injury is occasioned by the *least* negligence, or want of skill or prudence, on his part, the proprietor is liable. While such carriers do not warrant the safety of their passengers at all events, yet their undertaking and liability go to the extent that they and their agents possess competent skill, and that so far as human foresight can go, such passenger shall be transported safely. And in *Aston v. Heaven*, 2 Esp. 533 (1), it is said that the carrier is not liable where there has been *no* negligence or default in the driver, but he is answerable for the *smallest* negligence of such driver. In *Story on Bailments*, 601, the inquiry is made whether such carriers are bound to *ordinary* care and diligence and liable for only ordinary neglect, or are they bound to *extraordinary* care, and liable for slight neglect. The answer is given in these words: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, that is—for the *utmost* care and dili-

it, without twenty days' notice in writing. A declaration against the company charged that they were owners of the railway, and of carriages used for the conveyance of passengers along it for reward; that the plaintiff became a passenger in one of the carriages, for reward to them; and it became their duty to use due care in conveying him, Breach, that they did not use due care in conveying him, but so negligently conducted themselves in carrying him, and managing the carriage in which he was passenger, the

train to which it was attached, and the engine, whereby it was drawn upon the railway, that the carriage was thrown off the rails, and the plaintiff injured: Held, that no notice of action was necessary, the company being sued in their capacity of carriers, and not for anything done or omitted under the act.

1. In *ASTON v. HEAVEN*, 2 Esp. 533, it was held that coach owners are not liable for injuries happening to passengers from accident or misfortune, where there has been no negligence or default in the driver.

gence of very cautious persons, and of course they are responsible for any, even the *slightest* negligence." And so in *McKinney v. Neil*, 1 McLean, 540, "the driver must not only be skillful, but he is bound to exercise the *utmost* degree of care. The *least* degree of imprudence, or want of care on his part, fixes the liability of his employers." And see *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. 626. And finally in *Ingalls v. Bills*, 9 Met. 1 (1), it is said: "That carriers of passengers for hire, are bound to use the *utmost* care and diligence in the providing of safe, sufficient and suitable coaches, harness, horses and coachmen, in order to prevent those injuries which human foresight can guard against; and that if an accident happens from a defect in the coach which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable, in case of injury to a passenger happening by reason of such accident." And see the following cases to the same effect: *Ware v. Gay*, 11 Pick. 106 (2); *Ross v. Hill*, 2 Man. Granger & S. 877 (3); *Laing v. Colder*, 8 Barr. 479 (4); *Hall v. Conn. Steamboat Co.*, 13 Conn. 319 (5).

We see nothing in the instructions given in this case, but what is fully warranted from the foregoing authorities, and we have found none holding a less stringent rule (6).

Judgment affirmed.

1. Reported with the *Massachusetts* cases, page 426, *post*.

2. Reported with the *Massachusetts* cases, page 426, *post*.

3. In *Ross v. Hill*, 2 Man. Gr. & S. (C. B.) 877, an action against a cab proprietor, the declaration stated that the plaintiff hired the vehicle, and that, in consideration of the premises, and that the plaintiff with his luggage would become a passenger, and of certain reward, the defendant promised the plaintiff to carry and convey him and his luggage safely and securely, and alleged a loss of part of the luggage by the negligence of the defendant's servant: *Held*, that the declaration was sufficient to charge the defendant for

a breach of his implied duty to use an ordinary degree of care, the words safely and securely not necessarily importing a more extended liability.

4. Reported with the *Pennsylvania* cases in volume 10.

5. *Hall v. Conn. Steamboat Co.*, 13 Conn. 319, is reported in this volume, page 136, *ante*.

6. *Sales v. Western Stage Co.*, 4 Iowa, 547, is cited in *Russ v. Steamboat War Eagle*, 14 Iowa, 363, 9 Am. Neg. Cas. 326, *post*; *Moore v. Des Moines & Fort Dodge R'y Co.*, 69 Iowa, 491, 9 Am. Neg. Cas. 334, *post*; *Pershing v. Chicago, B. & Q. R'y Co.*, 71 Iowa, 561, 9 Am. Neg. Cas. 337, *post*.

INJURED ON BOAT—PASSENGER RESTING ARM ON WINDOW SILL OF LADIES' CABIN. — In an action to recover damages against defendant as a common carrier of passengers, for the breaking of the arm of plaintiff's wife, while a passenger on defendant's boat, plaintiff recovered judgment for \$3,000 from which defendant appealed. On appeal the Supreme Court in discussing the errors assigned, said: "On the trial a material starting point was to ascertain and determine the true character of the contract under which plaintiffs took passage upon the boat. They claimed that defendant undertook to carry them from Dubuque to St. Paul and back, as an entire trip, they having the privilege to remain on the boat as such passengers while the boat was at St. Paul. The injury sustained by the wife occurred some two or three hours after the boat landed at St. Paul, and while she was in port. Defendant claims that there was no contract for the round trip, but that plaintiffs took passage for St. Paul, and paid for that alone; that at the time of the injury the boat had fulfilled her contract, and that plaintiffs were then on the boat as invited guests and not as passengers. If the latter was the character of the undertaking it is conceded that the court below ruled correctly in holding that defendant would not be liable except for the gross negligence of her officers and crew. If the former, it is claimed that the boat was held to the utmost diligence and care, and would be liable for slight negligence. As to the contract, several witnesses testified for the defendant as well as plaintiffs, and the court instructed the jury as follows: 'If the jury believe from the testimony of Piper that he was authorized to engage the passage of plaintiffs to St. Paul and back, and did so; and that in pursuance of such agreement the plaintiffs went on board the defendant [steamboat] and started on the passage, it is immaterial at what time the fare was paid, provided it was paid when demanded by the officers, and it is also immaterial whether part of the fare was paid on the up trip and part on the down, or all at one time.' Second. This suit rests upon the allegations in the petition of a contract between the parties for carrying the plaintiffs from Dubuque to St. Paul and back. That the jury must find such a contract between persons authorized to enter into the same. That such a contract to be binding must be reciprocal and so made as to be binding upon Russ to pay the fare, whether he went or not, and that unless such a contract was entered into, 'they must find for the defendant.' Under these instructions, it is claimed by the defendant that the verdict was contrary to the evidence, for that the testimony did not show such contract. In this view, however, we cannot concur. There was certainly testimony from which the jury could fairly and justly conclude that such a contract was made. It is not for us to say whether the evidence upon this point preponderates in favor of the finding; for the verdict must be upheld, according to well settled rules, unless we are satisfied that the discretion vested in the District Court has been abused. And to justify this conclusion, it is well

settled that it must appear that the verdict was clearly against the weight of evidence. *Jourdan v. Reed*, 1 Iowa, 135; *Freeman v. Rich*, 1 Iowa, 504; *Schumacher et ux. v. Gelpcke*, 11 Iowa, 84, and the cases there cited. Two considerations may be briefly suggested as applied to this point. It was the duty of the jury to ascertain the contract from all the testimony and all the circumstances of the case. The words 'round trip,' or 'contract,' may not have been used, nor were they necessary. The question is, what did the parties intend? Did plaintiffs have good reason to believe from the conduct and language of the officers of the boat, that they had a contract for the round trip, and did they hence believe that such a contract had been made? If so, and they acted upon it, the contract was complete. And that this was the understanding, we think the jury might very justly conclude. Then, again, the most that can be claimed is that the testimony is conflicting. And yet, it is not more so than many cases coming under our observation. Indeed, in a case so warmly contested as this, involving so much where witnesses testify years after the occurrence, conflict or disagreement may almost be said to be the rule, and entire agreement the exception. To reconcile the different versions of the transaction as detailed by the witnesses, and arrive at the truth in the premises, was the duty of the jury, and we are not at liberty to interfere with their finding, unless a much stronger case is made than is presented in this record. Then, as to the instructions above quoted, we do not see how, taking them both together, they could reasonably have been more favorable to defendant. They clearly state the law governing the point most controverted, and the jury could not mistake their duty. If they found the contract as claimed by plaintiffs, then the first instruction was their guide. If as claimed by defendant, then according to the second instruction, they had no further inquiry to make. It does not appear that, by the custom of the boat or otherwise, the prepayment of the fare was necessary to obligate defendant to carry passengers the round trip, and therefore, if it was paid when demanded, the contract in its essence was complied with. Nor would the liability of the boat be changed by the fact that because of the accident to the wife, no fare was exacted for her return to Dubuque. But it is said that these instructions are in conflict with others. Thus it is claimed that while the court charged as above quoted, 'that it is immaterial at what time the fare was paid' the jury were afterwards told to look 'to the time and manner of payment, and to draw their conclusions whether the fare being paid at two separate and distinct times, and in two separate amounts, were not proof of two separate and distinct contracts.' In these instructions, however, there is no necessary, nor, to our minds, even apparent conflict. The first recognizes the rule that the time of payment is immaterial so far as it affects the legal liability of defendant. The latter only refers to certain circumstances bearing more or less remotely, as matter of evidence, upon the contract as it was claimed by the respective parties.

Again, while the charge of the court as found on page 103 of the record (following *Sullivan v. P. & R. Co.*, Am. Law Reg., April, 1858) is not questioned, yet it is claimed that the fifth and sixth instructions asked by the defendant were the same in principle, and that their refusal was calculated to mislead and confuse the jury. If this was true, it would be no cause for reversing the case, for the court was not bound to give an instruction which had already been covered by the instructions in chief. *Raver v. Webster et al.*, 3 Iowa, 502; *Moffitt v. Cressler*, 8 Iowa, 122. But the instructions were not the same in substance, and those asked, as applied to the case, were properly refused. They assume that there was no contract for the round trip, and that when the boat arrived at St. Paul, and a reasonable time had elapsed for the passengers to leave, the protection of the defendant ceased. If the proposition had been stated hypothetically there might have been some propriety in asking it. But when it assumed as true, the very position claimed by defendant, and based thereon the relative duties and liabilities of the parties, its refusal was clearly not error.

"In the second place we are to consider so much of the instructions as present the duties of common carriers, for what negligence they are liable, and the duty of passengers before the carrier can be made liable. These instructions are very full and do no more than to enunciate what we understand to be well established, by all the text writers and best considered cases, as the law governing such liability. To quote these instructions at length and show their entire agreement with the law as thus settled, would serve no needful purpose at this time. The rules governing and many of the authorities applicable will be found in *Sales v. The Western Stage Company*, 4 Iowa, 547 (1). We do not understand that any of the instructions given in this case, exact a greater degree of care, prudence or foresight, than is required in that; and to the law as there stated, there is no just exception. And see *Frink & Co. v. Coe*, 4 G. Greene, 555 (2); *West v. The Steamboat Berlin*, 3 Iowa, 532."

On the question of damages the court held that the verdict was not so excessive as to entitle defendant to a new trial.

It was claimed that the charge was not confined to the law (3). The Supreme Court on this point said: "It seems from all the testimony that Mrs. Russ was sitting in the stern of the boat, with her arm resting on and projecting out of the window. While thus seated a derrick and yawl fell, and one of the guys struck upon her arm thus projecting (4). In the introductory part of the charge,

1. Reported in 9 Am. Neg. Cas. 321, *ante*.

2. An abstract of this case appears in this volume, page 319, *ante*.

3. When the cause was first tried, there was a verdict for plaintiff for \$2,600, which was reversed on the ground that the charge of the court

was not confined to the law. 9 Iowa, 274.

4. In *SHERMAN v. WESTERN STAGE CO.*, 24 Iowa, 515 (1868), it appeared that plaintiff's intestate was thrown from a boat which capsized in crossing a swollen stream, and she was drowned. The boat was in

the court in speaking of the undisputed facts, stated there was no controversy but that the injury 'occurred while Mrs. Russ was sitting in the recess behind the ladies' cabin with her arm *on* the window sill.' It is objected that this was an error in fact, for the reason that the arm was not *on* the sill, but extending beyond it. The point made is not appreciable, for though the arm may have projected, it did, nevertheless, rest on the sill of the window. In this matter all the witnesses agree, and there is no room for the least controversy. The court but stated what neither party could, under the testimony, possibly deny." *Judgment affirmed.* Petition for rehearing overruled. Opinion by WRIGHT, J. WILSON, UTLEY & DOUD and BISSELL & SHIRAS, appeared for appellants; HENRY S. JENNINGS, for appellee. *Supreme Court, Iowa, December Term, 1862. Russ et ux. v. The Steamboat War Eagle, 14 Iowa, 363.*

NON-TRANSFERABLE TICKET—PERSON USING TICKET ISSUED TO ANOTHER INJURED ON TRAIN—TRESPASSER.—In an action to recover damages for injury to a passenger alleged to have been received by being thrown against a cupola platform while the train was being coupled the plaintiff recovered verdict and judgment. The action was brought originally by John Way, the injured person, but he having died, his administrator was substituted as plaintiff. Defendant appealed. The Supreme Court, in reviewing the case and discussing the question whether the plaintiff's intestate was a passenger or trespasser, in the

charge of one of defendant's employees, and was used to convey passengers from defendant's stage coach to a point across the river. Trial resulted in verdict and judgment for plaintiff for \$8,000. The defense was that the action was barred by statute of limitations; that the person in charge of the boat was not the servant of defendant; and that the conduct of the deceased contributed directly to the accident. Plaintiff was appointed administrator of the estate of his deceased wife, about four years after the accident, and as such commenced the action. On appeal by defendants the judgment was modified and affirmed on the plaintiff agreeing to remit from the amount all except \$5,000. Judgment for \$5,000. The court held that the action was not barred by the statute

of limitations, the statute not beginning to run until the appointment of the administrator, and that the question of contributory negligence, on which there was conflicting evidence, was for the jury to determine, their finding being conclusive.

In *SHERMAN v. WESTERN STAGE CO.*, 22 Iowa, 556 (1867), an action between the same parties on the same cause, as above stated, the court held that the statute of limitations applied, as the action was for tort and came within the class which must be brought within two years, and demurrer to the petition was sustained.

See *KELLOW v. CENTRAL IOWA R'y Co.*, 68 Iowa, 470, reported in this volume, page 332, *post*, overruling *Sherman v. Western Stage Co.*, *supra*.

course of its opinion said: "In April, 1881, the decedent took passage upon a freight train at Monroe, Jasper county, for Oskaloosa. In payment of his fare, he presented a mileage ticket, which had been issued to one R. G. Forgrave, at commutation rates. The conductor of the train, without knowledge that Way was not Forgrave, detached the coupons for his passage. Printed upon the ticket were several conditions, and also a printed acceptance of the conditions, which was signed by Forgrave, and the whole was denominated a contract. One of the conditions is in these words: 'This ticket is positively not transferable, and, if presented by any other person than the person whose name appears on the inside of the cover, and whose signature is attached below, it is forfeited to the company.'

"The defendant's theory upon the trial below was, that the decedent was not a passenger within the meaning of the law, and asked the court to instruct accordingly. This the court refused to do, and gave an instruction in these words: 'If you find from the evidence that the decedent was injured to the damage of his estate substantially as alleged, and that he was at that time riding in a caboose in the defendant's train, on the mileage ticket in evidence, issued by the defendant to R. G. Forgrave, and that, upon its presentation in payment for transportation, the conductor of the train accepted the ticket, and recognized and treated the decedent as a passenger, the defendant's duties and obligations were, and its liabilities now are, the same as if the ticket had been issued to the decedent, whether prior to the accident he disclosed to, or the conductor knew, his identity or not.'

"In respect to the measure of care which common carriers owe to passengers, the court gave an instruction as follows: 'Common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accident to passengers. Not the utmost degree of care which the human mind is capable of inventing, but the highest degree of care and diligence which is reasonably practicable under the circumstances, is what is required.'

"The giving of these instructions is assigned as error. The defendant insists that the contract relied upon, as constituting the relation of common carrier and passenger, was obtained by imposition and virtual misrepresentation, and, it being now repudiated by the company by a denial by it of its liability, the plaintiff cannot be allowed to set it up as binding upon the company; and that, if the relation of common carrier and passenger did not exist, the company did not owe the decedent the measure of care set forth in the instruction.

"It appears to us that the defendant's position in this respect is well taken. When the decedent presented the ticket, we must presume that he intended to be understood as claiming that he had a right to travel upon it. This claim involved the claim that he was Forgrave, for the ticket showed upon its face that no one had a

right to travel upon it but Forgrave. By the presentation of the ticket, the decedent falsely personated Forgrave, with the intention of deceiving the company; and he did deceive it, and to its injury, for, by reason of the deception, he escaped the payment of the full rate with which he was otherwise chargeable.

"It is not material, then, that the decedent obtained the conductor's consent. Whether his consent would have bound the company, if he had known that the decedent was not Forgrave, we need not inquire; it certainly did not under the circumstances shown. The only relation existing between the decedent and the company having been induced by fraud, he cannot be allowed to set up that relation against the company as a basis of recovery. He was, then, at the time of the injury, in the car, without the rights of a passenger, and without the right to be there at all. We do not say that it is necessary that a person should pay fare to be entitled to the rights of a passenger. It is sufficient, probably, if he has the consent of the company fairly obtained. But no one would claim that a mere trespasser has such rights; and it appears to us to be well settled that consent obtained by fraud is equally unavailing.

"The plaintiff insists that the extraordinary care described in the instruction does not become due from common carriers by reason of any contract, but simply by a rule of law which enforces the duty upon broader grounds. It is not important to inquire precisely how the duty arises. However it arises, the duty is one which the common carrier owes only to passengers, and if, as we hold, the decedent did not sustain that relation within the meaning of the law, the company did not owe that duty to him, and that is the end of the inquiry. The doctrine which we announce was very clearly expressed in *T. W. & W. R. Co. v. Beggs*, 85 Ill. 80 (1). In that case the court said: 'Was defendant a passenger on that train

1. A note of the case of *Toledo, W. & W. R'y Co. v. Beggs*, 85 Ill. 80, appears in this volume, page 227, *ante*.

Among other cases cited by the court are: *Union Pac. R'y Co. v. Nichols*, 8 Kan. 505; *T. W. & W. R. Co. v. Brooks*, 81 Ill. 292; *M. & C. R. Co. v. Chastine*, 54 Miss. 503; *Creed v. Penn. R. Co.*, 86 Pa. St. 130; *Relf v. Rupp*, 3 W. & S. 21; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185.

The plaintiff cited and relied upon *Bissell v. R. R. Co.*, 22 N. Y. 308; *Washburn v. Nashville, etc., R. Co.*, 3 Head, 638; *Jacobs v. St. Paul, etc., R. Co.*, 20 Minn. 125; *Penn. R. Co.*

v. Brooks, 57 Pa. St. 346; *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Flint, etc., R. Co. v. Weir*, 37 Mich. 111; *Dunn v. Grand Trunk R'y Co.*, 58 Me. 192; *Edgerton v. N. Y., etc., R. Co.*, 39 N. Y. 227; *Gregory v. Burlington, etc., R. Co.*, 10 Neb. 250; *Great Northern R'y Co. v. Harrison*, 10 Exch. 376. But none of these cases hold that the extraordinary care described in the instruction given is due to a person not a passenger, and none of them hold that the relation of passenger can be insisted upon, where the company shows affirmatively, as a defense, that the company's consent was obtained by fraud.

in the true sense of that term? He was travelling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances, the company could only be held liable for gross negligence, which would amount to willful injury' (1). * * *

"Another position taken by the plaintiff is that the ticket provides its own penalty for its violation, to wit, a forfeiture, and that no other penalty can be added. But the question before us is not as to the enforcement of a penalty by the company, but as to whether the decedent acquired the rights of a passenger. The right of the company to insist that he did not, if he never properly acquired the consent of the company to carry him as such, is independent of any question of penalty. We think that the instruction given by the court is erroneous, and that the judgment must be reversed." Opinion by ADAMS, J. M. A. LOW, appeared for appellant; JOHN F. LACEY, for appellee. *Supreme Court, Iowa, June Term, 1884. Way v. Chicago, Rock Island & Pacific R. R. Co., 64 Iowa, 48 (2).*

Among actions in Iowa relating to Injuries to Persons on Trains are the following:

TUTTLE v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co., 48 Iowa, 236 (1878), was an action for damages for injuries sustained by a passenger in a collision, due to two of the cars separating from the train and finally running into the other cars. Trial resulted in verdict and judgment for plaintiff for \$2,500. On appeal judgment reversed for erroneous instruction that it devolved upon defendant to satisfactorily explain accident, and in absence of such explanation negligence would be presumed against it.

On a former appeal in this case judgment for plaintiff was reversed because plaintiff was allowed to recover on account of loss of time and expenses incurred and paid by her husband. **TUTTLE v. CHICAGO, ROCK ISLAND & PACIFIC R. R. Co.,** 42 Iowa, 518 (1876).

KELLOW v. CENTRAL IOWA R'y Co., 68 Iowa, 470 (1886), was an action for damages for death of plaintiff's intestate who was killed

1. **ROSE v. DES MOINES VALLEY R. R. Co.,** 39 Iowa, 246 (1874), was an action for damages for death of person who was killed while riding on defendant's train, travelling on a free pass. Trial resulted in verdict and judgment for plaintiff for \$10,000. On appeal it was held that defendant was liable for injuries, notwithstanding special contract avoiding liability for negligence. Judgment modified

as to damages, on plaintiff remitting the excess over \$5,000. Judgment for \$5,000 affirmed.

2. On a subsequent trial of this action plaintiff had verdict and judgment which, on appeal, was reversed, the verdict being contrary to the instructions of the court. **WAY v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.,** 73 Iowa, 463 (1887).

in a collision while a passenger on defendant's train. Trial by jury; verdict for defendant. Motion for new trial sustained as to one out of twenty one grounds alleged for setting aside the verdict. Appeal by both parties. The Supreme Court sustained the decision of the Cerro Gordo Circuit Court in setting aside verdict and granting new trial, erroneous instructions as to negligence having been given. Judgment affirmed.

On the question of survival of action the Supreme Court rendered an opinion overruling the point stated in *Sherman v. Western Stage Co.*, 24 Iowa, 515, where a majority of the court were of the opinion that a cause of action did not accrue in favor of the deceased for the injury. In that case deceased lived for about ten minutes after the happening of the accident. In the Kellow case the interval between injury and death was shorter than that in the Sherman case, and it was held that where the injured person survived but a moment a cause of action, which survives to his representatives, accrues to him as if he had lived for a month or a year thereafter.

See *Sherman v. Western Stage Co.*, 24 Iowa, 515, reported in this volume, page 328, *ante*.

QUACKENBUSH v. CHICAGO & NORTHWESTERN R'y Co., 73 Iowa, 458 (1887), was an action for injuries sustained by plaintiff while a passenger on defendant's train, due to negligent manner of coupling the train, whereby the moving cars were thrown back with such force against the standing cars that plaintiff, who was sitting in a chair in the caboose, was thrown against the stove and his nose injured. Trial resulted in verdict and judgment for plaintiff. On appeal judgment was affirmed, the court holding that the evidence showed negligent handling of the cars; also that plaintiff was not guilty of contributory negligence in sitting on a chair which was in the caboose, although there was a stationary seat around the sides of the caboose for the use of passengers.

In BLAKE v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'y Co., 78 Iowa, 57 (1889), an action for damages for death of plaintiff's intestate, who was killed in a collision while travelling in a show car containing the properties of the play in which the deceased was a performer. The plaintiff's intestate had a first-class ticket for the passenger train, but in the evening, he with others of the company, went to bed in the show car, but was told by the conductor that he must not ride there, that it was dangerous and against the railroad rules. He, however, remained there and was subsequently killed in the collision which occurred, none of the persons in the passenger coaches being injured. On the trial there was judgment for plaintiff but, on appeal, this was reversed, the court holding that there was no evidence to justify verdict against defendant and that the plaintiff's intestate was guilty of contributory negligence in riding in an unsafe place.

On a subsequent trial of the action, plaintiff recovered judgment

which, on appeal, was affirmed. There was a radical difference in the evidence on the last trial from that offered on the first, as to the build of the show car, and the warning given by the conductor as to dangerous place. On the last trial it was shown that it was the duty of plaintiff's intestate to ride in the show car. The question of contributory negligence was properly left to the jury and their verdict on that issue could not be disturbed on appeal. **BLAKE v. BURLINGTON, CEDAR RAPIDS & NORTHERN R'Y Co.**, 89 Iowa, 8.

MOORE v. DES MOINES AND FORT DODGE RAILWAY COMPANY.

Supreme Court, Iowa, October Term, 1886.

[Reported in 69 Iowa, 491.]

DERAILMENT OF TRAIN—DAMAGES—ERRONEOUS INSTRUCTION.—In an action to recover damages for injuries sustained by plaintiff by reason of defendant's train, on which he was a passenger, being thrown from the track, it was held error to instruct jury that if a certain part of plaintiff's injuries was not caused by the accident he could not recover in the action, although he had suffered other injuries, and such error was not cured by another instruction that if the jury found for plaintiff they should award damages for all the injuries suffered by him (1).

APPEAL, from Dallas Circuit Court. The facts appear in the opinion. *Judgment reversed.*

CARDELL & SHORTLEY, for appellant.

NOURSE, KAUFFMAN & GUERNSEY, for appellee.

1. *Freight train derailed—Stockmen injured.*—In **HYDE (ADM'R) v. WABASH, ST. LOUIS & PACIFIC R'Y Co.**, 61 Iowa, 441 (1883), an action for damages for the death of plaintiff's intestate, a stockman, who was killed by reason of the car in which he was riding being thrown from the track as it was crossing a bridge over the Missouri river at St. Charles, Missouri, the court held that the injury occurring in Missouri, and plaintiff failing to show that by the laws of that State the action could be maintained by the administrator, an action could not be maintained in this State.

In **PLAYER v. BURLINGTON, CEDAR**

RAPIDS & NORTHERN R'Y Co., 62 Iowa, 723 (1883), plaintiff, a stockman, was injured in a derailment of the freight train on which he was riding. It appeared that he boarded the freight car, although he had time to get on the caboose, and while riding there the car was thrown from the track and he was injured. Held, that he was guilty of contributory negligence in riding on the freight car, and could not recover, although defendant's employees may have been negligent in not providing a reasonable passageway from its depot to enable plaintiff to get to the caboose in which he was to ride. *Judgment for defendant affirmed.*

Reed, J. — While plaintiff was travelling as a passenger on one of defendant's railway trains, the car in which he was riding was thrown from the track by a misplaced switch, and turned over on its side. He alleges that in the accident he was thrown against the side of the car, and against one of the seats therein, and that he was bruised and injured in his side, also in his arm and head, and that he sustained a rupture of the character known as a "scrotal hernia." He also alleges that the accident to the car was caused by the negligence of defendant's employees, who were in charge of the train. On the trial it was admitted that the overturning of the car was caused by a misplaced switch, and no evidence was introduced by defendant tending in any manner to account for the misplacement of said switch. Plaintiff testified that, by the turning over of the car, he was thrown on his side against the car, and one of the seats in it, and that when he got out of the wreck he discovered that one of his arms was bleeding; also that one of his fingers had been injured, and that some time after, in making an examination of his person, he discovered that his side was bruised, and that he was ruptured,—the latter injury being of the character denominated "scrotal hernia,"—and that he suffered a great deal of pain from the injury in his side and from the rupture; also that the hernia was not reduced until four days after the accident, when he went for the first time to a physician, who reduced it. Defendant introduced evidence tending to prove that the plaintiff was ruptured before the accident. It also introduced two physicians who had practiced their profession for many years, and had had much experience in the treatment of hernia, who testified that they had made an examination of plaintiff some time after the accident, and that they had heard his testimony as to the manner in which he had received the injury, and as to his symptoms immediately after it occurred, and each in effect, gave it as his opinion that the scrotal hernia of which plaintiff complained, was not caused by the accident.

I. The Circuit Court gave the following instruction, the giving of which is assigned as error: "If you find from the evidence that the plaintiff received an injury while riding on the cars of the defendant, by reason of the tipping over of a car in which he was riding, and while he himself was using all reasonable care and caution to avoid injury, as charged in the petition, then these facts will make a *prima facie* case of negligence against the defendant, and the burden of proof will be on the defendant to show that it, by its

agents and servants, did use all reasonably practicable care and precaution to prevent such injury, and that the accident resulted from a cause which could not have been foreseen or prevented by the exercise of reasonable care, vigilance and foresight on behalf of the company." The objection urged against the instruction is that it does not lay down the true rule as the degree of diligence and care which the carrier is bound to exercise for the safety of the passenger. The doctrine of the instruction is that the defendant would not be liable for the injury if the accident resulted from a cause which reasonable or ordinary care and diligence could not have foreseen and provided against; and in this respect it is erroneous. The rule has always been held, in this State, that the carrier was bound to exercise the highest degree of care and skill to preserve the safety of the passenger, and prevent accidents. See *Frink v. Coe*, 4 G. Greene, 555 (1); *Sales v. Western Stage Co.*, 4 Iowa, 547 (2); *Bonce v. Dubuque St. R'y Co.*, 53 Iowa, 278 (3); *Kellow v. Central Iowa R'y Co.*, 68 Iowa, 470 (4). We are of the opinion, however, that plaintiff was not prejudiced by the instruction. By it the jury were told that proof of the accident made a *prima facie* case against the defendant on the question of negligence. As it made no attempt to account for the accident, this was equivalent to a direction to find for plaintiff if the other elements of his case were established. The presumption is that the jury found against him on the other questions involved in the case.

II. The court gave the following instruction: "If you find from the evidence that the plaintiff, at the time of or prior to the accident complained of, was or had been suffering from the effects of inguinal hernia, and by reason of the overturning of the car received additional injuries of the affected parts, he would be entitled to recover for such additional injuries. But if you fail to find that the scrotal hernia was caused by the overturning of the car, as alleged, then and in that event plaintiff cannot recover." This instruction is erroneous. Under the evidence, the jury might have found that plaintiff suffered the injuries to his side and arm and hand alleged, and have failed to find that the scrotal hernia was caused by the overturning of the car. By the last clause of the instruction they are

1. See abstract of this case on page 319, *ante*.

2. Reported in this volume, page 321, *ante*.

3. *Bonce v. Dubuque St. R'y Co.*,

53 Iowa, 278, is reported in 3 Am. Neg. Cas. 347.

4. An abstract of this case is reported in this volume, page 332, *ante*.

told, in effect, that, if that is the state of the proof, plaintiff cannot recover. Yet he clearly was entitled to recover if he had established that he sustained any of the injuries in the accident of which he complained. It is true that in other instructions the jury were told that, if they found for plaintiff, they should award him such damages as would compensate him for all the injuries suffered by him in consequence of the overturning of the car. But these instructions, in so far as they warranted the jury in awarding the plaintiff damages for the minor injuries of which he complained, if they found against him as to the chief injury complained of—the scrotal hernia—are in conflict with the one set out above, and it is impossible to determine which instruction the jury obeyed. We cannot say that for the minor injuries plaintiff was entitled to recover no more than nominal damages. On the contrary, the jury would have been justified, under the evidence, in awarding him substantial damages on account of the alleged injury to his side.

Other questions argued by counsel relate simply to the order of the trial, and will not be likely to arise on a retrial of the cause.

For the error pointed out the judgment will be reversed and the cause remanded.

PERSHING V. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

Supreme Court, Iowa, March Term, 1887.

[Reported in 71 Iowa, 561.]

DERAILMENT OF TRAIN—BROKEN BRIDGE—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.—In an action to recover damages for death from injuries sustained while a passenger on defendant's train, due to the derailment of the train and the breakdown of the bridge over a gully or ravine instructions were properly given that the burden was on plaintiff to show that the injury was caused by the negligence of defendant; that if it was established that the accident was caused by defective construction of the roadway, bridge, track, etc., or by the management or running of the train, there would be a presumption of defendant's negligence, and the burden would be upon defendant to show the contrary; and that defendant was not required to show how the accident occurred and that it was free from all negligence in the matter, but only to prove freedom from negligence in the matters which the circumstances indicated were the cause of the accident and injury.

CARRIERS—DEGREE OF CARE.—The rule uniformly recognized and enforced in this State is that the carrier, in the conduct and management

of his business, and as to all the appliances made use of in the business, is bound to exercise the highest degree of care and diligence for the convenience and safety of his passengers, and he is held liable for the slightest neglect. There are certain dangers necessarily incident to railway travel and these the passenger assumes when he elects to adopt it. But all that is meant by the rule is that carriers by railway should use the highest degree of care that is reasonably consistent with the practical conduct of the business.

CONSTRUCTION OF ROADBED—INSTRUCTIONS.—An instruction to the effect that the degree of care required of defendant in the selection of plans and materials for its roadway, bridges and appliances was such as was exercised by the best and most skillfully and carefully managed railroads in the country, under like circumstances, was not erroneous, but if open to the objection that it makes the very practices which are called in question the law of the case, it was met by another instruction that defendant was bound, not only to select such plans and materials for the construction of its road and appliances as were in use by the best and most skillfully conducted roads of the country, but that such materials and plans must have been found sufficient by the other roads.

CONSTRUCTION OF BRIDGE—INSTRUCTIONS.—An instruction that defendant "was not required to so construct its bridge that it would resist an unusual and extraordinary shock of a derailed train, running at regular speed, and striking it with great force," did not afford plaintiff ground of complaint where the same was materially modified by additional instructions to the effect that defendant was required to take into account, in constructing and maintaining its bridges, the fact that accidents might occur in the operation of its road, and to construct its bridges with reference thereto, and that it was held to a very high degree of care in that respect.

APPEAL, from the Polk Circuit Court. *Judgment affirmed.*

"On the eighth day of February, 1885, a passenger train on defendant's railway was derailed, as is supposed, by a broken rail, at a point near a bridge over a gully or ravine. When the train went upon the bridge, the wheels on one side passed outside of the guard rail, and the bridge was broken down, and the car in which plaintiff's intestate was riding as a passenger was thrown into the gully or ravine, and she received injuries which caused her death. This action was brought for the recovery of the damages sustained by her estate. There was a verdict and judgment for defendant, and plaintiff appeals."

PARSONS, PERRY & SHERMAN, for appellant.

J. W. BLYTHE, H. H. TRIMBLE and RUNNELLS & WALKER, for appellee.

Reed, J.—It is alleged in the petition that the injury was caused by the negligence of the defendant, and that its negligence con-

sisted, first, in the manner in which its track and bridge were constructed and maintained, the latter being insufficient; and, second, in the manner in which the train was being run at the time of the accident. The evidence is not contained in the abstract, but it is recited in the "bill of exceptions" that plaintiff introduced evidence tending to prove the occurrence of the accident and injury, and that the deceased was not guilty of any contributory negligence, and that the accident was caused by the negligent manner in which the track and bridge were constructed and maintained, and the negligent manner in which the train was being run at the time, and by the insufficiency of the bridge, and that he then rested his cause; that the defendant thereupon introduced evidence tending to prove that its road, and said bridge, and its rolling stock, and its servants and agents, were in all respects such as were accepted by, and were in general use, and found to be sufficient and approved by the best and most skillful managed railroads of the country, doing a like business under like circumstances with it; and the selection of its materials, and the plan and construction of its roadway, track, bridges and rolling stock, and the selection of its employees, servants and agents, and the inspection and repairs of its road and machinery, and appliances connected with the operation of the road, were such as the best, most carefully, prudently, and skillfully managed railroads in the country exercise and require, doing a like business, and under like circumstances; and that the bridge went down, and that the car in which the intestate was riding was thrown into the ravine, by reason of the derailment of the train, at a point 378 feet from the bridge; that the ties, rails and fastenings, and the ballast thereunder, at that point and between there and the bridge, were in all respects such as had been found sufficient by the most skillfully and prudently managed railroads of the country, doing a like business, under similar circumstances; that the same were, from time to time, and as frequently as by other railroads, inspected in the usual way of inspecting such appliances by the most carefully and prudently managed railroads of the country, by an employee of competent skill and experience in such matters; and that the rails and joint fastenings appeared sound, and all their supports sound and secure; and that there were no flaws or defects visible that could have been discovered by such inspection; and that the shock or blow which caused the bridge to fall was of unusual and extraordinary violence, and that the bridge would not otherwise have gone down, and that the guard rails on the bridge were such as were usually and custom-

arily used by the most skillfully managed railroads of the country, under like circumstances.

In rebuttal, plaintiff produced evidence tending to prove that the bridge was not sufficient, either in plan or construction; that the guard rails were not of sufficient size, and were not properly placed or fastened; that the joint fastenings at the point at which the derailment occurred were insufficient and were broken prior to the occurrence of the derailment; and that the break might have been discovered, by a careful and proper inspection, before the passage of the train.

The errors assigned all relate to the instructions given by the court to the jury.

1. In the seventh, eighth and thirteenth instructions, the jury were told, in effect, that the burden was on the plaintiff to show that the injury was caused by the negligence of the defendant; but that, if he had established that the accident was attended by circumstances showing that it was caused by the defective construction of the roadway, bridge, track, or the fastenings of the rail at the point where the derailment occurred, or its train or cars, or by the management or running of the train, this would raise a presumption of negligence, and would cast upon defendant the burden of proving that it was not caused by any negligence or want of skill on its part, either in the construction or maintenance of its roadway, track or bridge, or in the management of the train, or the condition of the cars, but that this presumption extended only to those portions of the track, machinery or bridge which the circumstances of the accident indicated were possibly defective, and it was not required to prove that nothing about its entire train and roadway were defective; and that the burden cast upon it by proof of the happening of the accident, and the attending circumstances, only required it to show that, as to the matters which the circumstances indicated were the cause of the accident and injury, it had exercised due care; and that it was not required to satisfactorily explain the reason of the breaking of the rail, and the derailment of the train, and the breaking down of the bridge, but was only required to prove that these things did not occur through any negligence on its part.

The point urged by counsel for appellant is that the instructions are erroneous, in that they limit the burden imposed upon defendant by the evidence of the occurrence of the accident, and the attendant circumstances, to prove merely that it had not been negligent in respect to those matters which the circumstances indicated were the

cause of the injury. Their position is that the presumption which arises upon proof of the happening of the accident is not a mere presumption of negligence as to some specific matter, but is a presumption of general negligence on the part of the carrier, or, in other words, they insist that the presumption is that he is legally liable for the injury, and that this presumption can be overcome only by proof that it was caused by inevitable accident, and that it follows necessarily from this that he must account for the accident, and show that he was free from all negligence in the matter.

The rule which casts the burden of proof on the carrier is a rule of evidence, having its foundation in considerations of policy. It prescribes the quantum of proof which the passenger is required to produce in making out his case originally, and he is entitled to recover on that proof, unless the carrier can overcome the presumption which arises under the rule from the facts proven. *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Thomp. Carr*, 209.

The rule undoubtedly requires the carrier to prove his own freedom from negligence as to the cause of the injury. But that, it appears to us, is the doctrine of the instructions. The immediate cause of the injury to plaintiff's intestate was the breaking down of the bridge, and the consequent precipitation of the car into the ravine, and this was occasioned by the blow or concussion by the derailed train. In seeking for the cause of the injury, then, it became necessary to inquire as to the cause of the derailment of the train, and whether there was any defect in the track or roadway or bridge, or in the cars or machinery of the train, or any negligence in the management of it at the time; for the circumstances indicated unmistakably that the cause of the accident was to be found in some of these matters. They constituted the subject of the inquiry as to this branch of the case, and defendant very properly confined its proof, as to the diligence and care it had exercised, to that subject.

As there was nothing to indicate that any other matter could have contributed to the accident, it could not be required to show that it had been careful as to other matters. Such evidence would clearly have been immaterial, and the holding of the instruction is that it was not required to go beyond the cause of the inquiry in making proof of care and diligence. The holding that it was not required to give a satisfactory explanation of the cause of the breaking of the rail and bridge is supported by *Tuttle v. Chicago, R. I. & P. R'y Co.*, 48 Iowa, 236 (1).

1. An abstract of this case appears in this volume, page 332, *ante*.

2. The following instructions were given by the Circuit Court: "It is the duty of a railway company, employed in transporting passengers, to do all that human care, vigilance and foresight can *reasonably* do, consistent with the mode of conveyance and the practical operation of the road, in providing safe coaches, machinery, tracks, rails, angle bars, or splices, bridges, and roadway, and in the conduct and management of its trains for the safety of its passengers, and to keep the same in good repair. The utmost degree of care which the human mind is capable of inventing or producing is not required, but the highest degree of care, vigilance and foresight that is reasonably practicable in the conduct and management of its road and business is required. * * * Common carriers of passengers are held to the very highest degree of care and prudence that human care, vigilance and foresight could *reasonably* do, which is consistent with the practical operation of their road, and the transaction of their business; yet they are not absolute insurers of the safety of their passengers; and if you find that the defendant exercised all reasonably practical care, diligence and skill in the construction, preservation, inspection and repairs of its roadbed, bridges, track, rails, angle bars or splices, in the management and operation of its road, and of the train, at the time of the accident alleged and shown to have occurred, and that the accident could not have been prevented by the use of the utmost practical care, diligence and skill consistent with the practical operation of its road, and the transaction of its business, then plaintiff cannot recover in this action."

The rule which has been uniformly recognized and enforced in this State, is that the carrier, in the conduct and management of his business, and as to all the appliances made use of in the business, is bound to exercise the highest degree of care and diligence for the convenience and safety of his passengers, and he is held liable for the slightest neglect. *Frink v. Coe*, 4 G. Greene, 555 (1); *Sales v. Western Stage Co.*, 4 Iowa, 547 (2); *Bonce v. Dubuque St. R'y Co.*, 53 Iowa, 278 (3); *Kellow v. Central Iowa R'y Co.*, 68 Iowa, 470 (4). It is insisted that the instructions are in conflict with this rule. The position of counsel is that by the use of the words *reasonable*, *reasonably practicable*, and *reasonably practical* in the instructions, the

1. See abstract of this case, page 319, *ante*.

2. Reported in this volume, page 321, *ante*.

3. *Bonce v. Dubuque St. R'y Co.*,

53 Iowa, 278, is reported in 3 Am. Neg. Cas. 347.

4. An abstract of this case is reported in this volume, page 332, *ante*.

care for the safety of the passengers required of the carrier is lowered, and he is required to exercise reasonable or ordinary care only. It will be observed, however, that these words, as they are used in the instructions, while they to some extent limit the degree of care required of the carrier, have special reference to the practical operation of the railroad, and the conduct of the business. When the instructions are scrutinized, it will be found that the doctrine announced by them is that defendant was bound to exercise the highest degree of care and diligence which was reasonably consistent with the practical operation of its railroad, and the conducting of its business, and this is right. It is doubtless true that precautions could be used in the construction and operation of railroads that would prevent many of the accidents which occur as they are constructed and operated.

It sometimes happens that a derailed train is precipitated from a high embankment, and the lives of its passengers endangered or destroyed. Accidents of that character could be avoided by constructing all railroad embankments of such a width that a derailed train or car would come to a stop before reaching the declivity. But this would add immensely to the cost of constructing such improvements, and, if required, would in many cases prevent their construction entirely. If passenger trains were run at the rate of ten miles per hour, instead of from twenty-five to forty miles, it is probable that all danger of derailment would be avoided. But railroad companies could not reasonably be required to adopt that rate of speed. Their roads are constructed with a view to rapid transit, and the travelling public would not tolerate the running of trains at that low speed. When it is said that they are held to the highest degree of care and diligence for the safety of their passengers, it is not meant that they are required to use every possible precaution, for that, in many instances, would defeat the very objects of their employment. There are certain dangers that are necessarily incident to that mode of travel, and these the passenger assumes when he elects to adopt it. But all that is meant is that they should use the highest degree of care that is reasonably consistent with the practical conduct of the business, and that is the doctrine of the instructions, and it is abundantly sustained by the authorities. *Indianapolis & St. L. R'y Co. v. Horst*, 93 U. S. 291 (1); *Dunn v. Grand Trunk R. R.*, 58 Me. 187 (2); *Hegeman v. Western R. R.*, 13 N. Y.

1. *Ind. & St. L. R. Co. v. Horst*, 93 U. S. 291, is reported in 7 Am. Neg. Cas. 331. 2. Reported with the *Maine cases* in this volume, page 405, *post*.

9; Kansas Pacific R. R. v. Miller, 2 Colo. 442; Wood R. R., 1049-1054.

3. The eleventh, twelfth and fourteenth instructions given by the court are as follows:

"The degree of care required of defendant in the selection of its materials, the plan and construction of its roadway, track, bridges, and rolling stock, in the selection of its employees, servants, and agents, and in the inspection and repairs of its road, and the machinery and appliances connected with the operation of the same, is such as the best, most carefully, prudently and skillfully managed railroads of the country exercise and require, doing a like business, and under like circumstances.

"The high degree of care hereinbefore referred to, and required of defendant, embraces its roadway, track, bridges and rolling stock, and the selection of its employees, servants and agents. In supplying materials for and in constructing its roadway, track, bridges, and rolling stock, it was required to exercise that high degree of care to see that materials used were amply sufficient, and of such quality, size, pattern, as were accepted by and in general use, *and found to be sufficient and approved* by the best and most skillfully managed railroads of the country, doing a like business with defendant. In the selection of train-men, and in the management of its train, it was bound to exercise that high degree of care, and to provide men of sufficient experience, skill and prudence to run such train safely, as far as was practicable; and it was bound, also, in like manner, to see that, in the actual management of the train at the time of the accident, the train-men exercised a like degree of care and skill in managing and running the train safely in all respects, so as to avoid injury to the passengers. If defendant failed in any of these respects, and such failure was the cause of the injury complained of, it was negligent, and is liable.

"If you find that the rails which were broken were made by a manufacturer of good repute, were made upon the approved method of manufacturing rails, were properly tested by the proper known and usually applied tests then in practical use, and had been on the track for several years, and had successfully stood the strain of numerous passing trains without in any manner affecting their quality or strength, so far as could be seen by proper examination, carefully and skillfully made; if, at the time of the accident, they were placed and lying securely on sound ties, with good angle bars or splices at the ends, with sufficient ballast under the ties, with all their con-

nections and supports well adjusted; if they had been subjected to a daily inspection in the most approved and customary way of inspecting such appliances by the most careful and best managed railroads in the country, by some servant of competent skill and experience in such matters, and said rails appeared then sound, and all these connections and supports sound and secure; and if there were no flaws or defects visible, or that could have been discovered by such approved and customary inspection, made in the manner hereinbefore explained—then the defendant was not negligent with reference to said rails.”

Some of the members of the court think that the eleventh instruction is erroneous, but we unite in the conclusion that if it should be conceded to be erroneous, the plaintiff could not have been prejudiced by it. The doctrine of the instruction is that the degree of care required of defendant in the selection of plans and materials for its roadway, bridges and appliances was such as was exercised by the best and most skillfully and carefully managed railroads in the country, under like circumstances. The objection urged against it is that it treats the practices of the class of railroads named, in the matters in question, as affording an absolute standard of duty as to those matters, thus, in effect, making the very practices which are called in question the law of the case. We admit the force of the objection. But the twelfth instruction was drawn with special reference to the facts of the case, and in it the jury were told, in effect, that defendant was bound, not only to select such plans and material for the construction of its road and appliances as were in use by the best and most skillfully conducted roads of the country, but that such materials and plans must have been found sufficient by the other roads. This is clearly right. When a plan of construction, and the materials made use of, have been found by actual experience to be sufficient and safe, other roads whose business is to be carried on under like circumstances, are warranted in adopting them. To hold otherwise would be to hold that railroad companies, in the construction and operation of their roads, could not avail themselves of the experience of others, and that the construction and operation of every road must, to a great extent, be a matter of experiment. With this rule distinctly laid down as applicable to the facts of the case, we think the jury could not have been misled by the eleventh instruction, conceding that it is erroneous. This concession, however, must be understood as being made only for the purpose of the argument, for a majority of the court are of the opinion that the

instruction is not erroneous. We think, also, that the fourteenth instruction is correct.

4. In another instruction the jury were told that defendant "was not required to so construct its bridge that it would resist an unusual and extraordinary shock of a derailed train, running at regular speed and striking it with great force." After the jury had been considering the case for some time, they were again brought into court, and the court gave them further instructions on that subject, which very naturally modified the one quoted above. In the additional instructions they were told, in effect, that the defendant was required to take into account, in constructing and maintaining its bridges, the fact that accidents might occur in the operation of its road, and to construct its bridges with reference thereto; and that it was held to a very high degree of care in that respect. As thus modified, the instruction quoted affords plaintiff no just ground of complaint.

We have found no ground in the record upon which we think we ought to disturb the judgment, and it will be affirmed.

HIATT v. DES MOINES, NORTHERN AND WESTERN RAILWAY COMPANY.

Supreme Court, Iowa, October, 1895.

[Reported in 96 Iowa, 169.]

INFANT INJURED AT STATION—DUTY OF CARRIER TO LIGHT PLATFORM—INSTRUCTION.—Where plaintiff, five years old, was injured by falling between a moving train and a depot platform on defendant's railroad, an instruction that defendant was bound to the utmost care and diligence in the lighting of its platform was held erroneous as while a railroad is required to use ordinary and reasonable care to light its platform, so that persons using the same in going to and from trains might do so with reasonable safety, it is not bound to the utmost care and diligence required in furnishing conveyance to passengers.

APPEAL from Greene District Court. The facts appear in the opinion. *Judgment reversed.*

CUMMINS & WRIGHT, for appellant.

CARDELL & NICHOLS, for appellee.

Rothrock, J.—1. The plaintiff was injured by falling between a moving train and a depot platform on defendant's railroad. At the time of the injury she was about five years old. The injury was received at a station named Waukee. The plaintiff and her father and mother and two younger children were passengers on a train

which arrived at Waukee a little after 7 o'clock in the evening of February 18, 1893. The family were seated in the front part of the passenger coach in which they were travelling. When the train approached the station, and before it came to a stop, the father and mother of the plaintiff made preparations to leave the car, by vacating their seats. The conductor of the train preceded the family in going out of the car. The father of the plaintiff followed him, carrying one of the children and a satchel. The mother followed with the youngest child in her arms and holding the hand of the plaintiff. The father went down on the depot platform, and when the mother came to the steps, or on the platform of the car, the conductor, who was then standing on the depot platform, with his lantern, for the purpose of assisting the passengers on and off the train, lifted the plaintiff from the car, and placed her on the depot platform. The plaintiff, instead of going toward the depot building, went the other way, and about the time the train started she fell between the depot platform and the car, and the wheels at the rear end of the car run over and cut off four of her toes. The original petition in the case was filed on the second day of September, 1893. The negligence therein charged was as follows: "That on said day the plaintiff went on board of one of the cars of the defendant's passenger trains with her parents, as a passenger thereon, and that upon the arrival of said train at the station of Waukee, and while she was still a passenger upon said train, and was, with her parents, proceeding to alight from said train upon the platform of said station, which station, depot, and platform the defendant had negligently, wrongfully, and carelessly failed and neglected to light in any manner, and before she had time to alight and reach a place of safety upon said platform, and while she was proceeding with due care and caution, the employees of the defendant operating and running said passenger train, which passenger train the defendant had failed and neglected to properly furnish with a sufficient number of competent employees to properly manage the same and the engine attached thereto, wrongfully and negligently started said train, and, wrongfully, negligently and unskillfully started said train and car from which plaintiff was proceeding to alight upon the platform of said station, with a sudden and violent jerk, and with such rapidity as to throw the plaintiff off her feet and on the ground off the platform on the rail of said track, with one foot upon the rails in such a manner that the wheels of the cars of said passenger train run over her said foot." Afterwards the petition was amended by averring, in substance, that the conductor assumed

the sole charge of the plaintiff in alighting from the car, and that he put her in an unsafe and dangerous place, and did not place her in charge of her parents, and abandoned plaintiff in said unsafe position, and negligently and without giving plaintiff time to get to her parents, or to a place of safety, suddenly gave the engineer a signal to start the train, and caused the train to be suddenly and violently started, and with such rapidity as to throw the plaintiff off her feet, and on to the ground, between the platform and the train. Afterwards the plaintiff again amended the petition at great length. We are unable to determine the object of this second amendment. It is in the main a repetition of the original petition and the first amendment, with the addition that on account of the confusion caused by the failure to light the platform, the plaintiff was bewildered, and fell to the ground, and was injured. After the trial was commenced, the plaintiff again amended her petition by striking from the petition and the amendments thereto the allegations charging the defendant with negligence and failing to have a sufficient and competent number of employees in charge of said train. The answer denied all of the negligent acts charged. The court undertook to state the issues to the jury, and did so by setting out all of the substance of the original petition and the amendments, and the stating of the issues constitute large part of the charge to the jury. It is insisted on behalf of appellant that the court erred in stating the issues. We do not think the position is well taken. If the plaintiff had filed a substituted petition stating the acts of negligence of which complaint was made in a plain and concise manner, without repetition, the charge of the court to the jury, so far as the statement of the issues was concerned, might have been much abbreviated, and could have been properly understood by the jury. In a subsequent part of the charge the court correctly stated the negligence of defendant as follows: "The negligence set up by plaintiff as having been committed by the defendant is as follows: 1. That defendant's train was started suddenly, and without exercise of proper care; 2, that the conductor of defendant's train carelessly abandoned plaintiff in an unsafe and dangerous place, and started the train while plaintiff was in such unsafe place; 3, that defendant failed to properly light its depot platform. If the jury find from the evidence that the defendant was not negligent in any of the above-named particulars, then your verdict must be for the defendant." The court further instructed the jury as follows: "Railroads are public carriers and the utmost care is required of them for the safety of passengers upon

their trains. And a passenger is entitled to a reasonable time to leave the car in which he has been riding when a train is stopped for that purpose. It is the duty of the defendant to have its platform reasonably sufficient and safe in all respects, and such lights as are necessary to render the use of the platform and the passage over it to and from the cars reasonably safe, should be upon the platform during the time the train remains at the station. A railroad company, in the conduct and management of its trains, is required to employ skillful and competent agents, and to use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually exercise in similar cases; and, should an injury result to a passenger from failure to use such a degree of care and prudence, the company will be responsible for such injury, unless it appears that the passenger so injured, by use of ordinary care and prudence, could have avoided the injury, provided the passenger is of sufficient age and discretion to use such care."

It will be observed that the part of the charge above set out is, to say the least, misleading. The rule as to the care required in the transportation of passengers by a common carrier is that the carrier is bound to use the utmost care and diligence in providing for the safety of the passengers by the use of sufficient and suitable modes of conveyance, so as to prevent injuries which human care and foresight can guard against. The rule is familiar, and we need not cite authorities in its support. After stating this rule in substance, the court then directed the jury that it was the duty of the defendant to have a reasonably safe and sufficient depot platform, and such lights as are necessary to render the use of the platform and the passage over it to and from the cars reasonably safe. Then, in the next paragraph, the jury are directed generally that the greatest care and foresight was required of the defendant in providing for the safety of passengers. It is assumed all through the charge that the child was a passenger, even after it was placed on the platform; and this is not questioned by the defendant. There can be no doubt that after the plaintiff was placed on the platform the relation of a passenger had not ceased. If, in crossing the depot platform, it had been injured by some defect therein, or if it had been injured by falling over some obstruction which it could not see by reason of the darkness, the defendant would have been liable for the injury; but the measure of liability would not be determined by holding the defendant to the utmost care and diligence of which human foresight is

capable. It is true that the court, in one part of the instruction above set out, used the word "reasonable" in connection with the lighting of the platform, but in the same connection the rule as to the utmost care is applied generally to the whole case. The jury should have been plainly directed that the defendant was bound to use ordinary and reasonable care to light its platform, so that persons using the same in going from or to the trains might do so with reasonable safety. This appears to be the rule adopted by the weight of authority. In the matter of approaches to cars, such as platforms, halls, stairways, and the like, a railroad is not bound to use the utmost care to prevent accidents, but only ordinary care, in view of the dangers to be apprehended. *Kelly v. Railway Co.*, 112 N. Y. 443, 20 N. E. Rep. 383. In *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. Rep. 599 (1), it is said: "The company was not bound so to construct its platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted." See also *McKone v. Railroad Co.*, 51 Mich. 601, 17 N. W. Rep. 74; *Buenemann v. Railway Co.*, 32 Minn. 390, 20 N. W. Rep. 379 (2); *Railway Co. v. Cantrell*, 37 Ark. 519 (3). And see 2 *Rapalje & Mack, Dig. Ry. Cas. tit., "Carriage of Passengers."*

2. It appears from the evidence that a large lamp was usually placed in a bay window in the office of the station house. There was a conflict in the evidence upon the question whether the lamp was in position and lighted on the evening of the accident. In view of the fact that this was the only act of negligence which, under the evidence, would authorize a recovery, we think the jury should have been plainly and explicitly instructed upon the liability of the defendant for failure to have the lamp burning. The evidence does not show that there was any negligence in stopping and starting the train.

The judgment of the District Court is reversed.

1. *Laffin v. Buffalo & S. W. R'y Co.*, 106 N. Y. 136, is reported in 5 Am. Neg. Cas. 268.

2. *Buenemann v. St. Paul, Minn. & M. R'y Co.*, 32 Minn. 390, is re-

ported in 4 Am. Neg. Cas. 227.

3. *St. Louis, I. M. & S. R'y Co. v. Cantrell*, 37 Ark. 519, is reported in 2 Am. Neg. Cas. 110.

SAWYER v. SAUER.

Supreme Court, Kansas, July Term, 1872.

[Reported in 10 Kan. 466.]

PURPOSE OF INSTRUCTION.—The purpose of an instruction is to assist the jury in correctly applying the law to the facts of the case, and it not unfrequently happens that a general statement of the rights and obligations of the parties to a transaction assists materially to a clear understanding of the particular obligation claimed to have been violated.

DRIVER OF STAGE COACH INTOXICATED.—When a stage coach proprietor employs a known drunkard as a driver, through whose negligence, while intoxicated, a passenger receives injury, it is not error to instruct the jury that they may give exemplary damages.

CONTRIBUTORY NEGLIGENCE.—In case of personal injuries, slight negligence on the part of the plaintiff nor negligence which is only the remote cause of the injury, will not prevent recovery.

ERROR from Miami District Court. *Judgment affirmed.*

"Action by Sauer to recover for personal injuries sustained while riding as a passenger in defendant's stage coach. The petition alleged that the accident was caused by reason of the drunkenness, and carelessness, and recklessness of the driver of the coach; that the stage horses ran away, and while plaintiff was trying to extricate himself he was thrown to the ground and run over by the coach, his leg broken, etc. The principal facts are stated in the opinion. The action was brought in the District Court of Labette county, and taken on change of venue to the District Court of Miami county, where it was tried at the May term, 1872. The plaintiff asked several instructions, which were given, the first being as follows:

"1st. That a stage coach proprietor who carries passengers for compensation is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight. He is bound to furnish gentle and well-broke horses, skillful, prudent, and sober drivers, and the smallest degree of negligence in these particulars will render such proprietor liable for any injury to passengers therefrom. And if the jury believe from the evidence that Emil J. Sauer, while a passenger on defendant's coach received any injury on account of any such negligence of defendant, then they will find for the plaintiff."

Verdict and judgment for plaintiff for \$3,500. New trial refused, and Sawyer brings the case here on error.

MCCOMAS & MCKEIGHAN, for plaintiff in error.

Brewer, J.—Plaintiff in error is the surviving partner of the firm of Sawyer & Ficklin, who were proprietors of a stage coach line between Chetopa and Baxter Springs. Emil J. Sauer, the defendant in error, a minor, who sues by his next friend, while a passenger in one of the coaches of Sawyer & Ficklin, was injured, and brought his action in the District Court to recover damages therefor. Verdict and judgment were in his favor for \$3,500. To reverse this plaintiff in error brings the record here.

The main questions arise on the instructions. Objection is made to the first instruction given at the instance of the plaintiff. This instruction embodies a statement of the general duties and obligations of stage coach proprietors, and is conceded by counsel to state them correctly. The objection is that, being so full and general, it touches upon matters not in issue, and was therefore calculated to mislead the jury and induce them to consider matters foreign to the case. We do not think it open to that objection. The scope of inquiry under the petition seems to us wider than counsel state, and we do not find anything which was likely to have turned the thoughts of the jury away from the issues. The purpose of an instruction is to assist the jury in correctly applying the law to the facts of the case; and it not unfrequently happens that a general statement of the rights and obligations of the parties to a transaction assists materially to a clear understanding of the particular obligation claimed to have been violated. It may well have had that effect in this case. At any rate, we cannot see how it prejudiced the plaintiff in error, and that is as far as it is necessary for us to inquire.

The third instruction given at the instance of the plaintiff and the refusal to give instructions of an opposite character are also alleged as error. That instruction is as follows:

"That if they believe from the evidence that Emil J. Sauer, while a passenger on defendant's stage coach, was injured on account of the negligence of defendant by the employment of a known drunken driver, that they, the jury, are not confined in fixing the damages proven, but will be justified in giving exemplary damages."

In *Wiley v. Keokuk*, 6 Kan. 94, it was decided that "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages." It is needless to re-examine the question here. That decision settles the correctness of this instruction; for it hardly admits of doubt that the employment by a stage coach proprietor of a known drunkard, and entrusting to his care

the lives and limbs of passengers, is the grossest of negligence. The travelling community have the right to expect that the drivers of coaches, like the engineers of locomotives, are men not only competent, but of sobriety; and whenever a known drunkard is placed in such positions of trust, the party so placing him should pay smartly for such reckless indifference to human life. But it is claimed by counsel that there is not enough in the testimony to warrant such an instruction. There was abundant testimony, and from many witnesses, showing the intoxication of the driver at the time of the accident. One witness testified that he roused him out of a drunken sleep at the time the stage started, and but a short time before the accident, and helped him on to the driver's box, he being too drunk to get up without help. There was some testimony, though not abundant or positive, yet drawn from the defendant's witnesses, showing the use of liquor by the driver at other times, and tending to show intoxication on his part. Proof of actual knowledge by the proprietor is unnecessary. Proof of drunkenness so habitual as to be generally known in the community, is sufficient to raise a presumption of knowledge on his part. And while we think the testimony fails to show habitual drunkenness of the driver, or actual or presumptive knowledge thereof by defendant, yet it tends in that direction sufficiently to justify the court in laying down the law in reference thereto. The question was raised as to the right to award punitive damages, and it was proper for the court to lay down the rule respecting them.

The next question arises on the second instruction given by the court of its own motion, and the refusal to give several embodying in slightly different statements an opposite doctrine. That instruction is as follows:

"If the jury believe from the evidence that the plaintiff's negligence contributed to the injury complained of, he cannot recover. But if such negligence was only slight, or the remote cause of the injury, he may still recover, notwithstanding such slight negligence or remote cause."

It is a general rule that where the negligence of the plaintiff contributes to the injury he cannot recover. Where there is mutual fault the law will not try to determine which is the more to blame. Yet all that is required of the plaintiff is ordinary care and prudence. He is not called upon for the exercise of extraordinary diligence and care in averting the consequences of defendant's negligence. Of course, what is ordinary prudence varies with the situation and

surroundings. That which is ordinary prudence under some circumstances will be gross carelessness in others, so that no specific acts can be named as indicating the degree of care to be exercised. It is enough that the party does that which ordinarily prudent men would do under like circumstances. The rule in reference to this question is thus stated in *Shear. & Redf. on Neg.*, § 29: "Where the negligence of the plaintiff is relied upon to defeat his recovery he must have been guilty of at least *ordinary* negligence. His failure to take great care is no defense to the action." See also *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9; *Johnson v. Hud. River R. R. Co.*, 20 N. Y. 76; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566. It is true, some of the New York decisions say that any negligence on the part of the plaintiff will defeat a recovery; but these courts reject the idea of degrees of negligence, and hold that if one does that which ordinarily prudent men would have done, he is guilty of no negligence, so that they in fact announce no different doctrine. In this State we recognize the different degrees of negligence, and therefore the instruction is in this respect properly worded. *U. P. R'y Co. v. Rollins*, 5 Kan. 167. The law does not regard the remote causes of an injury. It is enough to determine the proximate causes. "The plaintiff's fault must also *proximately* contribute to his injury, in order to constitute any ground of defense." *Shear. & Redf. on Neg.*, § 33; *Isbell v. N. Y. & N. H. R. R. Co.*, 27 Conn. 293; *Richmond v. Sac. Val. R. R. Co.*, 18 Cal. 351; *U. P. R'y Co. v. Rollins*, 5 Kan. 167. Indeed, the instruction seems but to state the law as laid down in this last case, and a reference to that decision was really all that was necessary to dispose of this objection.

Several objections were raised to the admission of testimony, but none of them seem to us of sufficient importance to justify a reversal of the judgment. It is claimed that the verdict was excessive. It was for \$3,500. The plaintiff's leg was broken, with a compound fracture of the tibia. He was confined to his bed for thirteen weeks, and afterward was on crutches for a month or two. He suffered a great deal of pain during his confinement, and occasionally since. We do not feel warranted in disturbing the judgment on this ground. The judgment will be affirmed.

All the justices concur.

KANSAS PACIFIC RAILWAY COMPANY v. CUTTER.

Supreme Court, Kansas, July Term, 1877.

[Reported in 19 Kan. 83.]

PRACTICE—FOREIGN RECORD.—It seems that the attestation of a foreign record, under section 905 of the Revised Statutes of the United States must be made by the clerk in person, and cannot be made by a deputy or other person acting as a substitute for him.

PRACTICE—OBJECTION TO EVIDENCE.—An objection to the introduction of testimony, to be available in this court for purposes of error, must, except perhaps in cases where the defect cannot be obviated by further proof, distinctly and clearly state the point of objection, so that we can see from the record that the very matter to which our attention is directed was presented to the mind of the trial judge.

CHARGE.—Where the charge of the court is in accord with the instructions asked by the party now alleging error, it will, for the purposes of the case, be conclusively presumed to be correct.

DEATH—DAMAGES—STATUTORY ACTION.—In an action under section 422 of the Code of Civil Procedure (Gen. Stat., p. 709), to recover damages for the death of a party, and outside of the question of exemplary damages, the recovery is to be of a pecuniary compensation for a pecuniary loss.

DAMAGES.—In determining the amount of such compensation, much must be left to the good sense and sound judgment of the jury upon all the facts and circumstances of the case. No uniform and precise rule can be laid down for estimating the value to the survivors of the life of the deceased, for the elements which go to make up such value are personal to each case.

DAMAGES—INSTRUCTION.—A charge to a jury, in such an action, that they are not to take into consideration the pain suffered by the deceased or the wounded feelings of the surviving relatives, but may consider the relations between him and the next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same, is held under the circumstances of the case to present no error.

PECUNIARY LOSS—DAMAGES—VERDICT.—Where the jury find the pecuniary loss to be a certain sum (in this case \$1,320), and in answer to a specific question say that the loss consisted of notes and mining stocks, and there is testimony that the deceased had notes and mining stocks which were lost on account of his death, and the amount of the verdict seems to be but a reasonable compensation for such loss, the verdict will be upheld, although the amount named by the jury cannot be

deduced from the testimony by any mere addition of the items of an account, and although it is not made perfectly clear in what manner, whether by running of the Statute of Limitations, or otherwise, the death of the deceased brought about the loss of the notes and stocks.

DERAILMENT OF TRAIN—PASSENGER KILLED—DEFECTIVE TRACK—DAMAGES.—Where the testimony shows that the railroad train upon which the deceased was riding as a passenger was thrown from the track, and that thereby the deceased received the injuries from which he died, and fails to show any unusual speed or want of care in the management of the train, or by any direct evidence the cause of the train's being thrown from the track, and discloses as the only evidence of negligence on the part of the company the fact that some of the ties at and near the place of the accident were rotten, and it appears that the company had a suitable and competent person in charge of the track at that place as section-boss, and that he was from time to time and as fast as he deemed necessary for the safety of the track replacing the old and rotten ties with new and sound ones. *Held*, that no case was shown for exemplary damages (1).

APPEAL, by defendant. *Judgment affirmed.*

"Action by Lydia H. Cutter, as administratrix of the estate of Joseph Stewart, deceased, to recover damages sustained by the next of kin of said deceased by reason of his death. The plaintiff was appointed administratrix of said estate by the Probate Court of Arapahoe county, territory of Colorado. Stewart came to his death

1. *Among other actions in Kansas relating to the Derailment of Trains are the following:*

SOUTHERN KANSAS R'Y Co. v. WALSH, 45 Kan. 653 (1891), action for damages for injuries sustained by reason of the derailment of the train on which plaintiff was travelling. Judgment for plaintiff for \$5,246 affirmed.

MISSOURI PACIFIC R'Y Co. v. LOVRLACE, 57 Kan. 195 (1896), action for damages for injuries sustained by reason of derailment of train. Judgment for plaintiff for \$4,500 in the Johnson District court. Defendant appealed. On appeal it was held that the opinion of medical expert of past mental condition based on present physical examination alone was inadmissible. On the question as to release of damages, the defense being that there had been

a compromise and adjustment of the claim by the injured person executing two separate papers releasing the company from liability, and the reply being that plaintiff was mentally incapacitated when she signed the first paper, and that she signed the second through misrepresentation and fraud of the company, the court examined the testimony and held that the same did not support the charge of fraud. *Held* also, that proof of previously unknown statements of prevailing party, sufficient cause for new trial, on ground of newly discovered evidence. Judgment reversed.

In **ATCHISON, TOPEKA & SANTA FE R. R. Co. v. ELDER**, 57 Kan. 312 (1896), judgment for \$3,000 was affirmed where plaintiff's intestate was injured in a derailment of the train on which he was a passenger.

in Riley county, in this State, while riding as a passenger on the cars of the Railway Company, August 1st, 1872, while *en route* from Kansas City, Mo., to Denver, Colorado; and this action was brought under § 422 of the Civil Code, the petition alleging that the deceased's death was caused by the wrongful acts, negligence, and mismanagement of the defendant.

"[The case was here upon demurrer to the petition, 16 Kan. 568, when it was held, that an administrator appointed in another State or territory could maintain an action in this State under said § 422.]

"A trial upon the merits was had in the District Court, at the March Term thereof 1876. The plaintiff offered in evidence the record of the Probate Court of Arapahoe county upon which her appointment as administratrix was made, and also the letters of administration issued to her as such administratrix. Such record and letters were dated September 27th, 1872, and such letters of administration were authenticated as follows:

TERRITORY OF COLORADO, COUNTY OF ARAPAHOE, ss.

I, Webster D. Anthony, county clerk of said county, and ex-officio clerk of the Probate Court of Arapahoe county, do hereby certify the above and foregoing to be a true, correct, and complete transcript and copy of certain letters of administration issued to Lydia Harvey. [The petition states that since the issuance of these letters of administration to the plaintiff, she has intermarried with Benj. P. Cutter; and the action is brought in her present name of Cutter]; upon the estate of Joseph Stewart deceased, as the same appears from the original now on file in my said office.

Witness my hand and the seal of said court, at Denver, in said county, this 4th day of June, 1875.

[Seal.]

Webster D. Anthony, Clerk,
By James F. Watson, Deputy.

TERRITORY OF COLORADO, ARAPAHOE COUNTY, ss.

I, William C. Kingsley, judge of the Probate Court of said county and territory, do hereby certify that the said Webster D. Anthony, who by his deputy James F. Watson hath signed the above certificate and attestation, and to which the seal of said Probate Court is annexed, was on the 4th day of June 1875, and the time said certificate and attestation was made, the clerk of the said Probate Court, and the keeper of the records and files of said court; that the said certificate and attestation of the said Webster D. Anthony is in due form, and by the proper officer, and to all acts by the said Webster D. Anthony so done, full faith and credit are and ought to be given, in judicature, and without.

This 18th day of August, 1875.

William C. Kingsley, Probate Judge.

"The letters and record were admitted in evidence over the objec-

tion and exception of defendant. Several witnesses testified respecting the condition of the defendant's railroad track, the injury and death of Stewart, his age, health, circumstances, etc., and his next of kin, and their dependence upon him for support, or assistance. The jury found for the plaintiff, and assessed her damages in two items—compensatory, \$1,320; exemplary, \$2,200. Judgment upon the verdict for \$3,520, and the Railway Company brings the case here on error."

C. E. BRETHERTON and J. P. USHER, for plaintiff in error.

GREEN & HESSIN, for defendant in error.

Brewer, J.—This was an action under section 422 of the Code, by the personal representative of Joseph Stewart deceased, to recover damages for the death of the deceased caused by the negligence of the company. The first error alleged is in the admission of a record of the Probate Court of the territory of Colorado, certified to in the name of the clerk by a deputy. It is not claimed that this record as authenticated was admissible under the section of our statutes applicable thereto (Gen. Stat., p. 700, § 371), but it is claimed that it was under section 905 of U. S. Revised Stat. That section however authorizes attestation by the clerk, and names no other person. And it seems to be settled that this of itself grants no authority to a deputy clerk. 1 Greenleaf on Ev. (13th ed.) § 504; Stephenson v. Baumster, 3 Bibb, 369; Morris v. Patchin, 24 N. Y. 394. This last case is directly in point, and in it the court says: "The attestation is directed to be by the clerk, and not by any person acting as a substitute for the clerk, or possessing like power under the State laws. In making the certificate, which is made evidence under the act of congress, the clerk derives his authority from the federal and not from the State laws, and the certificate has vitality and effect, not by reason of the official character of the officer making it under the laws of the State, but in virtue of the act of congress prescribing it as the mode of proof in this particular case. The certificate of the judge, as to the authority of any person other than the clerk to make the certificate, is of no more force than would be a like certificate as to the effect of the judgment. Again, if a deputy clerk, or other person, could make the certificate by reason of the power conferred upon him by the State laws, and thus satisfy the act of congress, such law should be proved as other facts are proved, or as other laws are proved, and not by the certificate of the judge, which is not made evidence of any such fact. The records were not competent evidence, and were improperly admitted."

But it is insisted that, conceding the defect in the authentication, no objection was made on that ground, and therefore the error will not now be considered. When offered, the record was objected to "as being incompetent." Thereafter a motion was made to strike out the record "as not being competent evidence;" and finally an instruction was asked in reference to the fact sought to be proved by it. "No competent evidence has been offered," etc. Was this objection sufficient to raise the question now presented? In *Ferguson v. Graves*, 12 Kan. 43, it was said, "that where evidence is apparently admissible for any purpose, or under any circumstances, the court does not err in admitting the same, unless the reasons for its exclusion are given by the party objecting, has been repeatedly decided by this court." And in *Botkin v. Livingston*, 16 Kan. 41 that "if a party fails to object to the introduction of an instrument on the ground that its execution is not proven, he cannot thereafter raise the question. He has waived that point." In 1 Greenleaf on Ev. (13th ed.) § 421, the author uses this language: "It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory." The idea of course is, that as this court simply reviews the rulings of the District Court it should be made clear to us exactly what these rulings were. A party should not be permitted to try his case upon one series of questions in that court, and upon another in this. If upon every question to which the attention of that court was directed it ruled correctly, with what propriety is it said that it erred, and for its errors the judgment must be reversed? As said in the case of *E. & C. R. R. Co. v. Lawrence*, 29 Ind. 622, "it is of consequence in the administration of justice that all such questions shall be so distinctly made in the lower court, that judgments shall not be liable to reversal upon points never before the mind of the presiding judge, which do not affect the real controversy, and which if suggested might have been obviated." In the case of *Bundy v. Hyde*, 50 N. H. 117, it appears that on the trial an objection was made to testimony as "not competent." The judge desired that the specific ground of incompetency be pointed out. This not being done, he declined to consider the objection, and this ruling was sustained. The *State v. Jones*, 7 Nev. 408, is still more closely in point. An objection was made to a deposition as incompetent evidence. Depositions were admissible in a criminal case only under certain circumstances and conditions. Although the record failed to show those circumstances and conditions, yet the objection was held too general to

reach the point of a failure to show that the deposition was taken a case authorized by statute. See also *Camden v. Doremus*, 3 Ho U. S. St. 515; *U. S. v. Anguisola*, 1 Wall. 352; *Longabaugh v. V. & T. R. R. Co.*, 9 Nev. 271; *Dewy v. Dornec*, 18 Cal. 83; *Leek Wilson*, 24 Cal. 398.

It may not be possible to specify in advance a form of objection which will be sufficient in every case. The only rule that can be laid down is, that it must be such as distinctly and clearly present the precise point of objection, and upon which the ruling of the court is asked. We must be able to see from an examination of the record that the attention of the trial judge was called to the matter presented to us. It often happens that the objection is so general that it is apparent that a very general expression could not fail to bring it to the attention. If it does, that is sufficient. But not infrequently such general expressions really cover up the specified matter, and naturally call the attention away to something else. Then they are not sufficient. Now in the case at bar there was a pivotal question as to the right of a foreign administratrix to maintain such an action. True, it had been ruled upon in the District Court on demurrer, but it had not yet been determined in this court. It was still an open question. When therefore the record of the letters of administration in Colorado was offered in evidence, an objection that such evidence "was incompetent" would naturally suggest this vital question and indicate simply a desire to preserve that question beyond a chance of waiver. The thought of the court would scarcely be turned to the mere authentication of the record. It would look to the substance rather than the form of the testimony—to that which was irrelevant, and beyond the power of correction, rather than to that which was incidental and could be corrected. Thrice was the objection presented, and the very repetition, as well as the manner of repetition, would only strengthen the conviction that the substance of the question was all that was sought to be raised. It seems to us that the attention of the District Court was not distinctly and clearly called to the specific objection here made, and that, therefore, it should not now be considered. It perhaps should be remarked before passing from this subject, that the views we have expressed are in reference to cases in which the defect could be obviated by further proof. If the defect was necessarily fatal, and could not be avoided by other testimony, the consideration suggested might have little force.

Objections were also taken to the instructions of the court on the question of damages. The instructions authorized the award

exemplary or punitive damages. For this they are now challenged; but as the instructions asked by plaintiff in error also recognized the propriety of such damages in actions of this nature, we do not think the question is fairly in the case. It may be remarked, in passing, that there is a marked difference in the language of the statutes of the various States in this respect. In some, as in California and Kentucky, such damages are expressly or by clear implication authorized. *Myers v. San Francisco*, 42 Cal. 215; *Bowler v. Lane*, 3 Met. (Ky.) 313. In others, New York, Ohio, Wisconsin, Illinois and Pennsylvania, by the present statute the recovery is plainly limited to the actual damages to compensation. *Green v. Hudson River R. R. Co.*, 32 Barb. 25; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Cassillo v. Landwehr*, 28 Wis. 522; *Even v. C. & N. W. R. R. Co.*, 38 Wis. 613; *Brady v. Chicago*, 4 Bissell, 448; *C. & P. R. R. Co. v. Rowan*, 66 Pa. St. 393; *P. R. R. Co. v. Keller*, 67 Pa. St. 300. Such also is the force of the original English statute known as Lord Campbell's Act, 9 and 10 Vict. 93 (1); *Blake v. Midland R'y Co.*, 18 Q. B. 93 (2). While in some States, as Maine, Colorado, Kansas

1. The sections in Lord Campbell's Act, 9 and 10 Vict. c. 93, relating to damages, after reciting that no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, enacts, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

By a. 2, every such action shall be for the benefit of the wife, husband,

parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased. And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death; to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

2. In *Blake v. Midland R'y Co.*, 18 Q. B. 93, it was held that in an action founded on the 9 and 10 Vict. c. 93, by the wife, husband, parent or child of a person killed by misfeasance, the jury, in estimating the damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.

and Pennsylvania prior to 1868, the statute simply provides for the recovery of damages. *State v. Railroad Co.*, 58 Me. 176; *K. P. R'y Co. v. Miller*, 2 Col. 442; *K. P. R'y Co. v. Lundin*, 3 Col. 94; *Penn. R. R. Co. v. Zebe*, 33 Pa. St. 330 (1); *Penn. R. R. Co. v. Henderson*, 51 Pa. St. 315 (2). See also *Field on Damages*, p. 490, and following, where the various statutes and rulings are collected. It is said in the Maine case, that the purpose of the statute was simply to prevent the abatement of the action by the death of the party injured, leaving all other matters to be controlled by the ordinary rules governing actions for personal injuries. But as before stated, it is hardly necessary for us in this case to settle the construction and effect of our own statute.

The instructions are also challenged in respect to the measure of damages other than exemplary. The language of the charge is as follows:

"You should not take into consideration the pain suffered by deceased, or the wounded feelings of the surviving relatives, nor give punitive damages, unless said accident was the result of gross carelessness, and reckless indifference to the rights of passengers. But you should give what you deem a just compensation to them for such loss. And in determining the same, you may take into consideration all the circumstances attending his death; the relations between him and his children, and next of kin; the amount of his property; the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same. Damages, in a case of this kind, must depend very much upon the good sense and sound judgment of the jury, upon all the facts and circumstances of the case."

Many cases have arisen in the different States under statutes like this, and many inquiries have been made in the various courts as to the proper matters for consideration by a jury in fixing the damages. It is safe to say, that no rule has yet been laid down of definite and precise statement, and applicable to all cases. That the purpose of the statute was to give to the survivors compensation for the value of the life taken away, may be conceded; and therefore all the elements which go to make that life valuable, are proper matters

1. *Penn. R. R. Co. v. Zebe*, 33 Pa. St. 318, 330, is reported in 6 Am. Neg. Cas. 232. See also subsequent decision in same case, 37 Pa. St. 420,

6 Am. Neg. Cas. 243.

2. *Penn. R. R. Co. v. Henderson*, 51 Pa. St. 315, is reported in 6 Am. Neg. Cas. 244.

of consideration; and matters which do not affect its value to the survivors, such as the pain and suffering endured by the deceased; the grief and sorrow of the survivors, are not to be considered. But how shall the value of a man's life be determined? By the needs of the survivors? Where the deceased leaves a family of small children, should the recovery be greater than where he leaves none? That logically would exclude all recovery where the deceased left no one dependent upon him. By the probable earnings of the deceased? That would often furnish the most inadequate compensation in the most deserving of all cases, as, where a wife and mother is the party killed. By the present value of the probable net accumulations of the deceased, considering his present business and expectation of life? That would be open to objections of the same character as the last, only of a far more serious nature. In the very nature of things it seems to us an exact and uniform rule for measuring the value of the life taken away to the survivors, is impossible. The elements which go to make up the value are personal to each case. All that can well be done is, to say that the jury may take into consideration all the matters which go to make the life taken away of pecuniary value to the survivors, and, limited by the amount named in the statute, award compensation therefor. To go beyond this, and lay down an arbitrary rule for valuing the life of the deceased, a rule applicable to all cases alike, however satisfactory it might be because of its uniformity, would in many instances operate to defeat the accomplishment of the wholesome purposes sought by this act. It was well said by Mr. Justice Nelson in the case of *Railroad Co. v. Barron*, 5 Wall. 90, in language quoted in the charge in this case, that "the damages must depend very much on the good sense and sound judgment of the jury, upon all the facts and circumstances of the particular case." The instructions as given in this case find abundant support in the latest and best decisions, and do not present matters other than those proper for the consideration of the jury. Thus in the case of *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282, the court says: "The jury were instructed to put a value upon his life, and in doing this to have regard to his probable gains and accumulations, his age, his health, his usual wages, and the family he had to support. We have said that in this class of actions all that can be sought or recovered is pecuniary indemnity for a pecuniary loss, and we think nothing else was submitted to the jury in this instance." In *McIntyre v. N. Y. Central R. R. Co.*, 37 N. Y. 287 (1), "What did

1. *McIntyre v. N. Y. Central R. R. Co.*, 37 N. Y. 287, is reported in 5 Am. Neg. Cas. 97.

the deceased usually earn?" was held to be a proper question as tending to show the value of the decedent's life. In *Filley, Adm'r, v. Hudson River R. Co.*, 24 N. Y. 471, it was said, that "It is not required that the degree of kindred should be such as to create the duty of sustenance, support or education," and the same proposition is affirmed in *R. R. Co. v. Barron*, 5 Wall. 90. See also *Filley, Adm'r, v. Hudson River R. Co.*, 29 N. Y. 252; *K. P. R'y Co. v. Miller*, 2 Col. 442, and cases hereinbefore cited on exemplary damages. The only expression in the charge which occurs to us as possibly misleading, is that which suggests for the consideration of the jury the circumstances attending the death of the deceased. Outside of the question of exemplary damages, it is the fact and not the manner of death that determines the amount of damages. But from the view we have taken of the testimony, we cannot think that the plaintiff in error was prejudiced, or the jury misled.

The jury found a general verdict for the plaintiff, but answered specific questions as follows:

"Q. If you find for the plaintiff, state the pecuniary loss sustained by the next of kin of the deceased by the death, and in what such loss consisted. Ans. We find that the next of kin of Joseph Stewart, deceased, have sustained pecuniary loss by his death to the amount of \$1,320. Said loss consisting of notes and mining stocks.

"Q. If you assess damages beyond pecuniary loss sustained by next of kin, state the amount. Ans. We further assess damages beyond the pecuniary loss sustained by the next of kin, at the amount of \$2,200."

An examination of the testimony satisfies us that there was evidence sustaining the first answer, but that no case was made out for exemplary damages. A verdict of \$1,320, as the pecuniary loss, was not excessive. Perhaps it may not be clear how the jury reached that exact figure, as the loss in notes and stocks, for the testimony is in this respect indefinite, though Mrs. Cutter testified that her father had some notes and mining stocks which were lost on account of his death, the stocks being sold for non-payment of assessments; and again, that there was over \$1,000 in notes, and that she put them into a lawyer's hands, but that he could not collect any; that she was told that several of the parties whose notes he held were reliable; that one note given by a man named Parsons was for \$800 or \$900, and that he was as much able to pay now as he ever was, etc. Why the Parsons' note was not collected, is not specifically stated. Perhaps it was barred by the statute of limitations. But we do not wish to be understood as stating that the

testimony points out in exact sums the amount of \$1,320 in stocks and notes, or makes it perfectly clear how the death of the decedent brought about the loss even of those notes and stocks. We do decide however that \$1,320, as compensation for the loss, was warranted by the testimony; and that while the jury have indicated in what respect they considered the death as working a pecuniary loss, it is not essential to the sustaining of the verdict that from figures and amounts named in the testimony the result can be reached as by adding up the items in an account.

In regard to the damages above compensation, the exemplary or punitive damages, we do not think the case warranted such damages. The injury happened in this way: The train, upon which deceased was riding as a passenger, was thrown from the track, and thereby he received such bruises as caused his death in a few hours. The record is silent as to any positive evidence of the cause of the accident. It seems probable however, that the train jumped the track from some defect in it, rather than from running over anything, or with unusual speed. And in reference to a defect in the track, it appears that there were some rotten ties at and near the place of the accident. And that is the only matter of negligence which from the testimony can in any manner be imputed to the company. And while of course that is sufficient to sustain an award of compensatory damages, yet it does not disclose that gross and wanton negligence which is necessary to justify exemplary damages. It appears further from the testimony of the company, that it had a suitable party employed to take care of this portion of the track, as section-boss, and that from time to time he replaced the rotten ties with sound ones as he thought the safety of the track required.

We think, therefore, upon the whole case that the judgment should be modified by striking out the \$2,200 awarded for exemplary damages, and affirmed as to the rest. The costs of this court will be divided. All the Justices concurred.

Among actions in Kansas relating to Persons Injured on Trains, etc., are the following:

Freight train.—In *MISSOURI PACIFIC R'Y CO. v. HOLCOMB*, 44 Kan. 332 (1890), a passenger, while riding on a freight train, was injured by the sudden and violent jerking of the train. Verdict for plaintiff for \$5,000. On appeal it was held that when the caboose which is usually attached to such a freight train is in the repair shop, and a common box car with temporary rude seats is substituted to accommodate passengers, and the use of such box car is

more dangerous, the degree of care on the part of the company thereby increased. Held also, that a railroad company is required to exercise the highest possible degree of care and diligence to wh freight trains, used by passengers, are susceptible. Judgment affirmed.

Construction train.—In CHICAGO, KANSAS & WESTERN R. Co. v. FRAZER, 55 Kan. 582 (1895), an action for damages for death of plaintiff's son who was killed in a collision at a crossing, it was held that where a person takes passage upon a construction train to run over an unfinished railroad, and is aware of its incomplete condition, and that the track had just been laid to the point of destination, and there had not been sufficient time to build a depot or provide station facilities at that point, the company does not owe him the duty to have a suitable depot and platform at the end of the line, and the absence of the same cannot be regarded as negligence toward him. Judgment for plaintiff for \$5,000 reversed.

Stockman injured.—In ATCHISON, TOPEKA & SANTA FE R. Co. v. LINDLEY, 42 Kan. 714 (1889), a stockman, who voluntarily got upon the top of a train moving backward and while watching a brakeman trying to make a coupling, the train gave a sudden jerk forward and the stockman was injured, it was held that the stockman having voluntarily assumed a position of danger, the railroad was not liable in damages. Verdict and judgment for plaintiff for \$9,833 reversed.

Persons not passengers.—In UNION PACIFIC R'y Co. v. NICHOLS, 8 Kan. 505 (1871), it was held that where a railway company transporting freight and messengers for an express company, and a person not in the employ of the express company goes into the baggage car with the regular express messenger, not as a passenger but for the purpose of learning the route, and assists the regular express messenger along the route, and the conductor of the train not knowing the facts, but supposing such person to be an express messenger in the employ of the express company, allows him to ride without paying his fare, and the baggage car turns over and said person is injured, that such person was not a passenger, and is not entitled to the rights of a passenger, and judgment for plaintiff was reversed.

At the trial of the case in the Shawnee District Court, June Term 1869, the jury found for the plaintiff, Nichols, and assessed damages at \$22,500, from which judgment defendant appealed and the same was reversed, as in the preceding paragraph stated.

In KANSAS PACIFIC R'y Co. v. SALMON, Adm'x, 11 Kan. (1873), an action for damages for death of a person killed in a collision, it was held that a person in the employment of a railroad company, riding from his home to his employment in a caboose car attached to a freight train, without paying fare, according to the custom and understanding of the parties, from which car a

trains all persons except employees of the company are excluded, of which exclusion such person has full knowledge, is not a passenger but only an employee of the company. [Citing *Union Pac. R'y Co. v. Nichols*, 8 Kan. 505, note of which case appears in the preceding paragraph.] Judgment for plaintiff for \$7,500 reversed.

In *McQUEEN v. CENTRAL BRANCH UNION PACIFIC R. R. Co.* 30 Kan. 689 (1883), the plaintiff, an employee riding upon a steam hand car, and paying no fare, was injured by reason of the car jumping the track. *Held*, that he was not a passenger and not entitled to the rights of a passenger. [Citing *Union Pac. R'y Co. v. Nichols*, 8 Kan. 505, and *Kan. Pac. R'y Co. v. Salmon*, 11 Kan. 83, for notes of which cases see the preceding paragraphs.] Judgment for defendant affirmed.

RIDING ON PLATFORM OF STREET CAR—DEGREE OF CARE REQUIRED OF CARRIER—INSTRUCTION.—In an action to recover damages for injuries sustained by a passenger while riding on the platform of a street car there was a verdict and judgment for plaintiff for \$200, from which defendant appealed. On appeal the Supreme Court, in the course of its opinion, said:

"The defendant in error was a passenger on one of the open cars of the street railway company on the evening of October 1, 1885, at a time when there was a vast concourse of people in the city of Topeka, drawn together by a sham battle on the fair grounds during a soldiers' reunion. The car upon which the defendant in error was riding was going north from the fair grounds along a street known as Topeka avenue. On this street, and between Huntoon and Thirteenth streets, is located alongside of the main track of the street railway, and to the east of it, a switch track, 217 feet long from point to point, used to allow cars to pass. The car upon which defendant in error was riding was what is called an open car; on each side of the frame of the car, extending its whole length, there was a footboard from eight to ten inches wide, to enable passengers to step into and out of the car. And on occasions when there was a large and unusual number of passengers to be carried, these footboards were utilized by the company, and passengers were allowed to stand upon them, and to be carried on them from station to station. Higgs was standing on the west footboard, north of the center of the car and near to its front end when the car turned onto the switch, went so far north on it and approached so near to its intersection with the main track, that a closed car coming south on the main track ran so near the open one on which he was riding, that he was squeezed against one of the posts that support the roof of the open car, and was bruised and injured in the shoulders and back. The jury found in answer to special questions submitted to them, that the open car upon which he was riding at the time the injury occurred was in motion; and there is no question under the evidence but that the closed car going south on the main track was also

slowly moving. It does seem that, considering the vast crowds of people which were being transported by the street railway company, the large number that was on this particular car, every seat being occupied, the front and rear platforms crowded and many persons standing on both footboards, it was gross negligence upon the part of the employees of the railway company to approach so near the intersection of the switch to the main track. This act of the employees of the company was the direct and immediate cause of the injury inflicted on the defendant in error. It is among the special findings of the jury, in substance, that the car was so crowded at the time Higgs got upon it that there was no seat which could be occupied by him, and that his only chance was to ride upon the foot-board. It is in evidence that when large numbers of people were to be carried, the railway company permitted passengers to ride on the footboards, and collected fare from them; that on this occasion people vastly in excess of the number of seats contained in such cars were carried, so that there was no contributory negligence on the part of the defendant in error in getting on the foot-board of the car to ride to town, and in standing there, being unable to secure a seat on account of the crowded condition of the car, there not being a vacant seat that he could have taken. It is sought to establish contributory negligence on the part of the defendant in error, by proof that before this time he was crippled, and on this day was using a crutch and cane; that the superintendent of the street railway company, to whom he was personally known, had noticed that he was using the crutch and cane, and had warned him not to attempt to get on the cars 'while there was such a rush,' and promised to get him a seat in the cars; that Higgs waited for more than one hour after that promise, during which time the superintendent states that probably twenty-five cars had started but he had done nothing to secure Higgs a seat. At the expiration of this time Higgs went north the length of a block, and he and a lady relative whom he was escorting on that day got on the car upon which he was injured, and rode down to the starting-place, hoping by that means to get a seat, but there was only one vacant seat, and that was given to the lady. As the car approached the usual stopping-place the crowd congregated there, awaiting an opportunity to get down town, surged on the car as those who had ridden from town were getting off, and occupied the seats as fast as they were vacated. The special finding is, that there was not a seat which he could have taken. Then according to the usages and practices of the company on such occasions, he had the right to get upon the footboard of the car and ride thereon, and in this case it was not an act of negligence on his part. He was not injured in the act of getting on the car, as the superintendent seemed to be in fear of; this act he had performed safely; but he was injured by the negligence of the employees of the company, who permitted the open car to be placed so near the point of intersection of the switch with the main track that the cars could not pass each other with safety to the passengers. We cannot see that his use of a cane, and his temporary use

of the crutch on that day, relieve the company from the liability caused by this act of gross negligence on its part. It appears from the evidence that the driver of the car was temporarily employed for the time of the reunion, and was probably inexperienced by want of former employment in this line of work, although the company kept him in its employment after the accident, and up to the time of the trial of the cause.

"It is said that he could have seen the car coming on the main track, and avoided the injury by the exercise of ordinary caution. This is a dangerous assumption for the plaintiff in error; it is virtually saying that the use of his eyes ought to have made it apparent that the company was about to commit an act of gross negligence; but, as he says he did not see the car until a moment before the injury occurred, we would much rather assume for the sake of the employees on both cars, that the risk was not so imminent as to be seen and apprehended by the passengers. As a matter of fact, he did not see the danger until it was too late to avoid it. He was not guilty of contributory negligence in respect to any of the acts and matters alleged.

"It must be held, that when a street railway company undertakes to carry large numbers of people, vastly in excess of the seating capacity of its cars, and permits passengers to ride on the platforms and footboards, without objection, and collects fare from them, and stops its cars when in such a crowded condition that no seats are attainable, and permits persons to get upon them to be carried from place to place, and when the cars are in such a crowded condition, with passengers riding on the footboards, runs them so near the intersection of a switch with the main track that they cannot pass without injury to passengers, the company is guilty of gross negligence.

"There is a very vigorous criticism of some instructions given, and of the refusal to give others, as requested by the plaintiff in error, but the important question to be solved is presented by the third instruction given, to wit: 'Carriers of passengers are bound to exercise *all possible skill, foresight and care* in the running of their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run.' It is said that this places the degree of care required of a street railway company too high, and hence it was error. Admitting that this instruction does hold the street railway company to a too strict rule of diligence and yet, as we view the evidence on the whole record, we would still hesitate to reverse the case. We doubt whether it would have been error in the trial court to have instructed the jury, as a matter of law, that the plaintiff was guilty of gross negligence in running its cars, for several reasons: First, the question of negligence in this case is to be determined very largely by the character of the act, and not by the character for care and caution which the street railway company may sustain, or by the care and caution it was trying to exercise generally on this particular occasion. The negligence complained of here was the commission of such an act, to wit, the placing of

the car on the switch so near the point of intersection with the main track that the most ordinary mind could see that injury would follow to those standing on the footboards. It seems that the evidence offered by the street railway company aggravates, rather than excuses, the negligence. It is in substance that there was another car going north, and following the one the injury occurred on, and that it was necessary to drive the first so far north on the switch as to allow the one that was following, room on the switch to pass the southbound car on the main track. This is a demonstration that the switch was not properly constructed, that it was too short, or that it was intended for only one car, and ought not to have been used by both cars going north. In either case, it shows negligence on the part of the company. The superintendent of the company testified that the length of the switch was 217 feet from point to point; that from the north point of the switch running south, the radius of increase of the width between the switch and main track for the first forty feet is one inch to the foot; for the next twenty or thirty feet there is not so much increase, as it then approaches a straight line parallel with the main track; that the cars could pass each other and not touch, when the front end of the car on the switch was twenty-six feet from the point where the switch left the main track. It is from 70 to 72 feet from the points of intersection where the switch commences to curve in for the purpose of running on the main track. This leaves a length of switch with an equal distance from the main track of 48 feet, the distance from the main track being not quite two feet. A person riding on the foot-board would be perfectly safe at any point on the switch until after it curves toward the main track. The skill, care and precaution of drivers, conductors and the superintendent generally amount to nothing, in view of the plain fact that this car was driven too far north on the switch. It was this act, in this particular case, that was the direct and immediate cause of the injury. The defendant in error had a right to presume due care on the part of the railway company. He was riding on the car in a position allowed to be occupied by other passengers on like occasions; he had no control over the employees of the company, and no knowledge of the switch, or that the company was using it beyond its safe and reasonable capacity, but he had the undoubted right to rely on the exercise of ordinary prudence by the street railway company, both as to the use of the switch and the management of its cars in the act of passing each other, when one or both were crowded with passengers. The fact that the cars, both in motion, came so near each other in the act of passing that the injured man was pressed by them, squeezed in between them, is not in dispute. Hence we say, that if the court below had charged the jury, as a matter of law, that this was gross negligence on the part of the street railway company, we would hesitate to say that it was error, but as that was not done, we will consider the instruction, and determine whether or not it stated the rule of diligence. Cars drawn by horses upon rails are in the main governed by the same rules as other vehicles. (Shearman

& Redfield on Negligence, 3d ed., 312.) In an action to recover damages for personal injuries sustained as a passenger in a stage coach, the court has approved an instruction which stated that "a stage coach proprietor who carries passengers for hire is responsible for all accidents and injuries happening to passengers, which might have been prevented by human care and foresight." *Sawyer v. Sauer*, 10 Kan. 466. So that the only objection to the instruction given in this case results from the use of the word "possible," and it means "liable to happen or come to pass;" "capable of existing, or of being conceived or thought of;" "capable of being done;" "not contrary to the nature of things." (Webster's Dictionary.) "All possible skill and care" implies that every reasonable precaution in the management and operation of street cars be used to prevent injuries to passengers; it means good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. All possible foresight means more than this: it means anticipation, if not knowledge, that the operation of street cars will result in danger to passengers, and that there must be some action with reference to the future, a provident care to guard against such occurrences, a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so. Is it possible that the thought never occurred to any one of the persons operating this street railway that a car on the main track and one on the switch could run so close together that they would collide, or that some one might be injured by their proximity? The instruction as applied to the particular facts of this case is not objectionable; its phraseology may not be felicitous, but it does not practically require any greater or higher degree of care than if the expression used had been "the highest" or "the utmost," and these are frequently found in the reported cases. [Citing several authorities.] * * * *Judgment affirmed.* Opinion by SIMPSON, C. JONES & MASON and J. G. WATERS, appeared for plaintiff in error; WILLIAM R. HAZEN and HAZEN & ISENHART, for defendant in error. *Supreme Court, Kansas, January Term, 1888. Topeka City Railway Company v. Higgs*, 38 Kan. 875.

PERSON NOT PASSENGER INJURED ON STATION PLATFORM—ASSISTING FRIENDS TO TRAIN—EMPLOYEES REMOVING TRUNK—CARRIER LIABLE.—In an action to recover damages for injuries received by plaintiff, Mary Johns, a lady about 63 years old, while standing on the defendant's station platform at Severy, Greenwood county, Kansas, by being struck and thrown down by the defendant's agents and servants in removing a trunk from the platform to the baggage car of a train then standing at the station, the jury rendered a general verdict for plaintiff, assessing her damages at \$4,000, and answered a number of special questions of fact, upon which the court gave judgment for plaintiff for \$4,000. Defendant appealed. The Supreme Court ruled upon the points (per the syllabus in the report of the case) as follows:

Where the evidence shows that three servants of a railroad company—a brakeman and two section foremen—in removing a trunk from where it lay on the company's station platform, which was covered with ice, to a baggage car, slid it on the ice and out of a straight line, and against the plaintiff, who was standing in plain view upon the platform. *Held*, that the evidence was sufficient to prove culpable negligence on the part of the railroad company's servants. And in such case, as such servants were then on the company's premises, performing this duty for the company, in the presence of other servants, and as they had performed similar services on prior occasions: *Held*, that it will be presumed that they were acting within the scope of the authority given to them by the railroad company.

Where an old lady went to a railroad station to assist friends, who intended to remove from the country permanently, to get to the station and upon a train then about to depart, and after bidding her friends good-bye, and after they had got upon the train, stood for about five minutes upon the station platform to see the train start and to bid her friends a last farewell. *Held*, that while so standing upon the platform she was not by reason thereof guilty of such culpable contributory negligence as would prevent her from recovering for injuries received through the negligence of the railroad company. *Held, further*, that no culpable contributory negligence in any respect was shown.

Declarations of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind, may generally be shown by any person who heard the same. *Held*, that no material error was committed in this case by the admission of evidence tending to show the declarations of the plaintiff with regard to pain, suffering and condition of the body. *Judgment for plaintiff affirmed.* Opinion by VALENTINE, J. GEO. R. PECK, A. A. HURD, C. N. STERRY and ROBERT DUNLAP, appeared for plaintiff in error; T. L. DAVIS and T. J. HUDSON, for defendant in error. *Supreme Court, Kansas, January Term, 1887. Atchison, Topeka & Santa Fe R. R. Co. v. Johns, 36 Kan. 769.*

FALLING FROM STATION PLATFORM — NEGLIGENCE OF PARTIES FOR JURY—LIABILITY OF RAILROAD COMPANY.—In an action to recover damages for injuries sustained by a passenger in falling from a station platform plaintiff recovered judgment for \$5,200, from which defendant appealed. The syllabus states the case as follows:

Plaintiff, a woman about fifty-two years of age, arrived at the railway company's station house in the city of Beloit before dark on May 6, 1886, intending to become a passenger on the defendant's westward-bound train, and purchased a ticket for that purpose. The station platform was about three feet high from the ground, and there were steps at the west end which she passed over in going from

the ground to the platform. She remained at the station waiting for her train to arrive until after dark. The train was delayed and it was not known when it would arrive. There were no water-closets or other like conveniences in or about the station house, and it became necessary for her to retire from the station house and from the platform. There was a public street at the west end of the platform, and she passed toward the east end. It was dark and there were no artificial lights upon the platform or outside of the station house; but there was sufficient natural light to enable her to see the platform and to see the ground. When she arrived at the east end of the platform she saw the edge of the platform and saw the ground, and believing that they were upon the same level, she attempted to pass from the platform to the ground; but the ground being about three feet below, she lost her balance and fell to the ground, causing the injuries for which she sued the railway company in this action. The case was tried before a court and jury, and the jury rendered a verdict in favor of the plaintiff and against the defendant for damages. *Held*, that the questions as to whether the defendant was guilty of negligence, and whether the plaintiff was guilty of contributory negligence, were proper questions for the jury, and that their verdict upon these questions is conclusive (1).

On the trial of the case the court permitted the plaintiff to introduce evidence tending to show that other persons had also fallen from the same portion of the platform where the plaintiff fell, and under circumstances of a similar character. *Held*, not error.

The court also permitted the plaintiff to read the deposition of a woman, taken in the same city where the trial was had, and only one day before the trial, and without any showing being made that the oral testimony of the witness could not be procured; but no objection was urged against the deposition for these reasons, and the reasons that were given for the objection that was urged against the deposition were not sufficient. *Held*, not error in permitting it to be read in evidence. *Judgment affirmed*. Opinion by VALENTINE, J. WAGGENER, MARTIN & ORR, appeared for plaintiff in error; A. H. ELLIS and WALROND, MITCHELL & HEREN, for defendant in error. *Supreme Court, Kansas, January Term, 1889. Missouri Pacific Railway Co. v. Neiswanger, 41 Kan. 621.*

1. *Trespasser at station*.—In CHICAGO, KANSAS & NEBRASKA R'y Co. v. PARKINSON, 56 Kan. 652 (1896), it appeared that the plaintiff, a boy about fifteen years old, was on his way to deposit letters in a railway post office on a train going eastward which was then approaching on one track. He was called back by the station agent and requested to deliver railroad letters to the baggage master on the same train at a time when a west-bound train was also approaching on a track which plain-

tiff was required to cross in order to reach the postal car. He was injured while returning from his errand by the engine of the west-bound train. *Held*, that under these facts it was error to instruct the jury that it was the duty of the station agent to protect the plaintiff from such dangers as might reasonably be expected at the time, and that if he failed to do so, the company employing him was liable for the injury. *Judgment for plaintiff for \$6,500 reversed.*

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. SICKINGS.

Court of Appeals, Kentucky, April, 1869.

[Reported in 5 Bush, 1.]

**PASSENGER'S ARM PROTRUDING FROM WINDOW SILL—
STRUCK BY CAR—CONTRIBUTORY NEGLIGENCE.**—In an action to recover for damages for injuries sustained by a passenger whose arm, while resting on the window sill of the car, with his elbow protruding outwards, was broken by coming in contact with a lumber car on the track, it was held that had the passenger properly occupied his seat, and committed no gross negligence by unthoughtedly and unnecessarily placing his arm in the window, no accident or injury would have befallen him; that he not only contributed to his own injury, but may be said to have mainly, if not entirely, produced it, and as there are no legal means of apportioning damages where both parties are guilty of negligence, the injured person cannot recover where he has been guilty of gross negligence, and the defendant has not been guilty of such grade, if of any, negligence (1).

APPEAL by defendant from verdict for plaintiff. The facts are stated in the opinion. *Judgment reversed.*

L. H. NOBLE, W. B. HARRISON and R. J. BROWNE, for appellant.
W. H. HAYS and L. R. THURMAN, for appellee.

Williams, Ch. J. — The Louisville and Nashville Railroad has a switch to its Lebanon Branch near Greenwell's Mill, which was

1. **FAVRE v. LOUISVILLE & NASHVILLE RAILROAD CO.**, 91 Ky. 541 (1891), was an action for damages for injuries sustained by a passenger whose arm, while protruding from the window of a fast moving car, was struck by some object and broken. Trial resulted in judgment for defendant, which, on appeal, was affirmed, the court holding that plaintiff was guilty of contributory negligence. Decided on the authority of *L. & N. R. R. Co. v. Sickings*, 5 Bush (Ky.) 1, (above reported) the court, after reviewing that case, saying: "It now seems to us that if the doctrine expressly recognized by this court, since that case was de-

cided, to be reasonable and just, and that so manifestly accords with current of authority in this country, be adhered to, the plaintiff in this case, upon his own statement of facts, has no right to recover. For the rule of law that a party is precluded from recovering for an injury to which he so far contributed as that but for his own negligence and want of ordinary care it would not have happened, can upon neither principle nor public policy be relaxed or qualified in this character of case, even if the conduct of the other party could be logically considered in any case." Opinion by LEWIS, J.

constructed and is mainly used for the purposes of transporting lumber from the mill.

The road company switch off such cars as may be needed, and the proprietors of the mill load them with their lumber, and the road company transports it to market.

The road agents had switched off two cars and securely scotched them at a safe place, when some one about the mill, and engaged in loading the switched cars, uncoupled them, and ran one so near to the main track that a leaning standard would come in contact with the passing train.

This switch is situated on a curve and cut, so that objects on it cannot be seen from a passing train more than some sixty yards. The first train that passed after this car with a leaning standard had been placed in such close contiguity to the main track, was going at a rate several miles per hour under the usual speed. When the engineer, for the first time, discovered the leaning standard and car, the train was within sixty yards of the switch. He, however, immediately shut off the steam and the brakemen put on the brakes without either ringing the bell or blowing the whistle, lest the passengers should unthoughtedly put out their heads to look as was usual, and thereby incur the danger of being injured.

The leaning standard of the standing car struck the passenger train rather above the lower sash of the car windows, and rubbed it from one end to the other.

The appellee was a passenger, sitting with his arm resting on the window sill and his elbow protruding outwards, when it came in contact with the leaning standard, which drove it back against the window jamb and broke it in two places; for which injury he sued the railroad company, and recovered a verdict and judgment for ten thousand dollars, which the corporation seeks to reverse.

Sickings was the only one, out of many passengers, injured. The liability of the company depends upon the questions whether appellee, by his own negligence, contributed to the injury, and whether, if so, the corporation, by its agents, was guilty of such negligence as to make it responsible.

In *Redfield on Railways*, sec. 150, it is said: In order to fix "the liability of a railway company as passenger carriers, two things are requisite—that the company shall be guilty of some negligence, which mediately or immediately produced or enhanced the injury; and that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury,

since no man can recover for an injury of which his own negligence was, in whole or in part, the proximate cause."

And in *Sedgwick on Damages*, page 495, it is said: "And in these, as in other cases where negligence or the infringement of the rights of others is complained of, the general rule appears to be, that at law the plaintiff, in order to recover, must be able to show that he has not in any way contributed to the accident. On the other hand, although he may have been in the wrong, still, if his error did not aggravate the difficulty, his right to relief will be unprejudiced; but the mere fact of the conduct of the plaintiff not being strictly regular is immaterial. The inquiry is whether his irregularity has augmented the mischief; if so, as the law is inadequate to apportion the wrong, there can be no recovery."

In a note to the section quoted from in *Redfield*, two exceptions to the general rule, that where the plaintiff contributes to the injury he cannot recover, is laid down, to wit: When the injury be intentionally done, or where it could be avoided by ordinary care on the part of the defendant.

In *Pittsburg and Connellsville R. R. Co. v. McClurg*, 56 Pa. St. 295 (1), the Supreme Court of Pennsylvania, in a case where the appellee's arm was injured by reason of protruding his elbow out of the window of the car in which he was a passenger, whereby it came in contact with another car standing on a switch of the appellant's road, says: "When a passenger on a railroad purchases his ticket, it entitles him to a seat in the cars. In the seat no part of his body is exposed to obstacles outside the car. He is secure there ordinarily from any contact with them. When he is thus provided with a seat, safe and secure, in the absence of accident to the train, and the carrier has a safe and convenient car, well conducted and skillfully managed, his duty is performed toward his passenger. * * * The duty of the latter on entering the car arises, namely: That he will conform to all reasonable rules and regulations of the company of occupying, using, and leaving the cars; and, after doing so, if injury befall him by the negligence of the carrier, they must answer; if he do not so conform, but is guilty of negligence therein, and if injured, although there may be negligence on the part of the carriers, their servants or agents, he cannot recover. * * * A passenger, on entering a railroad car, is presumed to know the use of a seat and the use of a window—that the former is to sit in and the latter to admit light and air. Each has its separate

1. Reported with the *Pennsylvania* cases in volume 10.

use. The seat he may occupy in any manner most comfortable to himself; the window he has a right to enjoy, but not to occupy. Its use is for the benefit of all, not for the comfort of him alone who by accident has got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled as to the fact that it is no part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is therefore without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. In a case, therefore, where injury stands confessed, or is proved to have resulted from the position voluntarily and thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so pronounced by the court. * * * In conclusion, we have simply to reassert, that when a traveller puts his elbow or arm out of a car window voluntarily, without any qualifying circumstances compelling him to it, it must be regarded as negligence *in se*, and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law."

This case reviewed many of the authorities, and found the same rule recognized by the Supreme Court of Massachusetts, in *Todd v. Old Colony R. R. Co.*, 3 Allen, 18, and 7 Allen, 207 (1); and by the Appellate Court of New York, in *Holbrook v. Utica and Schenectady R. R. Co.*, 12 N. Y. 236.

The same rule has been recently recognized by the Supreme Court of Indiana, *Lafayette and Indianapolis R. R. Co. v. Huffman*, 27 Ind. 288; *Indianapolis and Cincinnati R. R. Co. v. Rutherford*, 29 Ind. 82 (2); and by the Supreme Court of New Jersey, *Telfer v. Northern R. R. Co.*, 30 N. J. Law, 190; and virtually by this court at its present session in *Morel v. Mississippi Valley Life Insurance Co.*, in which it was held that appellant was not entitled to recover for an accidental injury to his finger caused by his thoughtlessly and unnecessarily putting his hand out of the car window, by which it came in contact with a post.

As by the general rule, appellee had his arm in the window without authority, and in violation of the presumed objects and use of

1. Reported with the *Massachusetts cases*, page 448, *post*.

2. Reported in this volume, page 273, *ante*.

the windows, it remains to determine whether the case comes within either of the exceptions to such rule.

It is not even suggested, much less proved, or even attempted to be proved, that the contact of the leaning standard with the passenger train was intentionally produced. Could it have been prevented by ordinary care on the part of the agents and servants of the company conducting the train?

The cars had been left at a proper place, and in a proper secure condition by those operating the previous train. Neither common prudence nor regard for the interest or safety of the passengers or property of appellants required that the train should be put at an exceedingly low speed, merely because they were passing a switch where there was no reason to apprehend that there was any obstruction.

The increased speed of travel is not only an object with the corporation, but also with the passengers; and with this increased power of steam and the vast weight of the trains comes increased danger, and reason for more care and diligence; yet this increased speed is made legal by the various charters granted to such companies; and the demands of the travelling community for rapid and cheap transition makes all unnecessary delay onerous to both the corporation and customers.

The mode of propulsion, the means of travel, the usual course of business, and common objects of the carrier, are all considerations entering into the question of diligence.

It could scarcely be expected that the speed of a railway train should be seriously slackened, time wasted, and delay to all the passengers caused, merely because it was passing an unimportant switch where there would reasonably be no apprehension of obstruction of any kind. As the proven speed of the train could, under the circumstances, be no evidence of carelessness, it remains to determine whether the situation of the standing car fixes responsibility upon the company. This could only be upon the establishment of some kind of agency for the company on the part of the mill proprietors or those controlling the switched cars.

It was no part of the company's business or undertaking to load the cars; but, as we infer from the evidence, the proprietors, as part of their own undertaking, received the cars on the switch and loaded them, and the corporation received the laden cars on the switch for transportation; and whilst the switch was part of the road, or rather a fixture to it, made to accommodate this lumber

business, yet the mill proprietors controlled the cars after being placed on the switch, not as agent of the company, but on their own account, and doubtless became responsible to the company or others for the proper management of them whilst so under their control.

But, as it is perfectly apparent in this case, had the appellee properly occupied his seat, and committed no gross negligence by unthoughtedly and unnecessarily placing his arm in the window, with his elbow protruding outside the car, no accident or injury would have befallen him. As no other passenger was injured, it is not perceived how he can recover; for he not only contributed to his own injury, but may be said to have mainly, if not entirely, produced it; and as there are no legal means of apportioning the damages where both parties are guilty of negligence, it is not perceived how a plaintiff can recover when he has been guilty of gross negligence, and the defendant has not been guilty of such grade, if of any, negligence.

There is a class of cases, as in the case of *Yandell v. Louisville and Nashville R. R.*, 17 B. Mon. 598, where the defendant can by ordinary observance, care, and caution, prevent an injury, and where, failing to do so must be regarded as even gross negligence, they will be held responsible, even where some negligence has been committed by the other party, his servants or agents, as the permitting in that case the servant of appellant to ride upon defendant's cowcatcher, whereby he was injured; but this case is not one of that class.

The voluntary situation of appellee's arm at the time of the injury must, in law, be deemed gross negligence, which contributed to the injury, and which will preclude him from any right of recovery, unless he can show gross negligence on the part of the defendant, or its agents or servants, and for whose conduct it is legally responsible.

The case of *Collins v. Louisville and Nashville R.R. Co.*, 2 Duvall, 114, decided by this court, involved a very different question, to wit: the responsibility of the company for an injury done through the negligence of one of its employees to another employee of a different and lower class, and which in nowise conflicts with the principles announced and approved herein.

As there was no intentional injury, nor such gross neglect as to manifest recklessness and bad faith, according to the evidence, even if a recovery could be had in this case, the amount of damages would have to be limited strictly to compensation, and not given by way of punishment. Compensatory damages alone, as decided by

this court in *Louisville and Portland R. R. Co. v. Smith*, 2 Duvall, 557 (1), could be recovered, and this measure was violated in this verdict and judgment. The instructions were at war with these principles, and erroneous and injurious to appellant.

Wherefore, the judgment is reversed, with directions for a new trial, and further proceedings consistent herewith, and an adaption of the instructions on the next trial to the evidence which may then be produced consistent with the principles of this opinion.

Among actions in Kentucky relating to Derailment of Trains are the following:

IN LOUISVILLE & PORTLAND R. R. Co. v. SMITH, 2 Duv. (Ky.) 556 (1866), an action to recover damages for injuries received by a passenger by reason of the horse car on which he was travelling being upset and thrown from the track and over an embankment, it was held that the burden of proof was on the defendant to show that the accident was not due to its, or its agents' fault. Held also, that damages should be restricted to compensatory damages and it was error to instruct that exemplary damages might be given, and for such error judgment for plaintiff for \$4,750 reversed. [Cited on the question of damages, in *Louisville & Nashville R. R. Co. v. Sickings*, 5 Bush, 1, 9 Am. Neg. Cas. 374.]

KENTUCKY CENTRAL R. R. Co. v. THOMAS' ADM'R, 79 Ky. 160 (1880), was an action for damages, for death of person killed in collision, the car being thrown from the track. It appeared that plaintiff's intestate was an express messenger, but at the time of the accident was not on duty, although riding in the express car. None of the passenger cars were wrecked. Held, that plaintiff's intestate was guilty of contributory negligence in riding in a dangerous place in the car, his seat being in the passenger and not in the express car. Judgment for plaintiff reversed.

OHIO VALLEY R'y Co. v. WATSON'S ADM'R, 93 Ky. 654 (1893), was an action for damages for death of a passenger caused by the derailment of a freight train. Held, competent for plaintiff to prove general bad condition of the track in the immediate vicinity of the accident, and not merely at the exact point of derailment. Defendant introduced evidence as to the good condition of the road for several hundred feet on each side of the point where the car left the track. Held, also, not error to instruct jury as to dangerous rate of speed at which train was going, evidence having been introduced on that point. Judgment for plaintiff for \$6,250 affirmed.

Stockman injured:—

LOUISVILLE & NASHVILLE R. R. Co. v. BELL, 100 Ky. 203 (1896), was an action to recover damages for injuries to plaintiff, a stock-

1. See abstract of this case in this volume, page 380, *post*.

man, on a freight train, due to careless switching of cars. Judgment for plaintiff for \$1,000. Held, improper to permit evidence to show there was a quarrel between some of the trainmen and passengers on the route, as being likely to influence the jury that the switching was done with intent to injure the passengers. Judgment reversed.

JUMPING FROM PLATFORM OF STREET CAR TO AVOID DANGER—EXCESSIVE DAMAGES.—In an action to recover damages for injuries sustained by a passenger while riding on the platform of a street car, plaintiff had verdict and judgment for \$4,000, from which defendant appealed (1). The Supreme Court, in reviewing the case as to excessive damages, said: "The appellee was a passenger upon a street car of the appellant, passing over the suspension bridge from Cincinnati to Covington. The driver upon appellant's cars acts both as such and as conductor. It appears that he can reasonably do so, as he collects the passenger fare, while the car is making the ascent to the crown of the bridge, and then resumes his place at the reins and brake of his car. The appellee, owing to the car being crowded, was standing upon the rear platform of it, with one foot upon the step. It had passed the crown of the bridge, and was descending upon the Covington side. Just behind it was another car of the appellant, which had just turned the crown of the bridge, and as it did so, the driver of it was not upon the front platform at the brake with the reins in his hands, but inside of the car, presumably yet engaged in collecting the fare of the passengers. In consequence of this his horses started down the incline of the bridge, as some of the witnesses say, in a fast walk, but, as others testify, in a trot, and the latter are probably correct. The rear car approached so near to the front one, as the burden of the testimony shows, that the tongue was over the tail-board of the platform upon which the appellee was standing, and as he testifies, struck him in the breast. Whether it did strike him or not is quite doubtful from the testimony, but in any event he does not complain of any injury on this account. Alarmed by the proximity of the rear car, he either stepped or jumped off, and in doing so fell upon the bridge and fractured the fibula or small bone of the leg at the ankle, and ruptured some of the ligaments. In consequence of this he was laid up for not over eight weeks, a physician attending him at least

1. In *CHESAPEAKE & OHIO RAILWAY CO. v. LANG'S ADM'R*, 100 Ky. 221 (1896), it was held not contributory negligence for a passenger on a crowded excursion train, to stand upon the platform, although there may have been standing room in the cars, and the railroad company is liable for any injury which

he may sustain while so standing, which was caused by its negligence, even though he would not have been injured had he been on the inside of the cars. Plaintiff's intestate was standing on platform of front car and was thrown off and killed in collision of excursion train with freight train. Judgment for plaintiff affirmed.

a part of the time. The testimony introduced by himself shows clearly that the fracture has united perfectly, and will never trouble him, but that the ligaments have not healed entirely, but will not trouble him save in going up or down hill, or when there is a change of weather, and then he will feel like one with a sprained ankle. This is all of it as shown by the entire testimony. The jury returned a verdict for \$4,000.

"A long line of decisions has established the rule that the verdict of a jury should not be interfered with upon the ground that it is excessive, unless flagrantly so; and this court has the highest regard for the province of the jury; but is not this verdict open to this objection? We doubt if a case can be found where a verdict for so large a sum has been sustained upon such circumstances as appear in this case, and where the injury was so slight. It is noticeable that the petition does not aver any special damage. It only proceeds for the injury. The appellee could not, therefore, recover any money expended by him or debt created on account of it. (Newman's Pl. and Pr., p. 411.) It is true that upon the trial he was allowed to prove, without objection, that while he was laid up, a flood came in the Ohio river, by which he was damaged \$3,000, and that he lost business by being confined on account of the injury. These losses were not, however, sued for; and while we can not reverse the judgment by reason of this testimony, as no objection was made to it, nor by reason of the probable fact that the verdict was based largely upon it, yet, we may consider it in arriving at a correct conclusion of the question we are now considering.

"The counsel for the appellee say: 'The appellant, without objection or exception, or effort to rebut, accepted appellee's own testimony that his financial damage was \$3,000, not including his unquestionable medical bill of \$500. The verdict of \$4,000, therefore, gives only \$500 for the pain and the permanent injury, which certainly exists.' The 'financial damage' and medical bill were not in question, however; the appellee neither asserted them nor attempted it; it was *probata* without *allegata*; he only proceeded for the injury. We must, therefore, assume that the entire sum found was for the injury; and the verdict of course does not show otherwise.

"It seems to us that it must strike every unprejudiced mind that the one is greatly disproportioned to the other. There were no circumstances of aggravation connected with the injury; it was not the result of willful or intentional neglect, or such as flows from bad faith of a *quasi* criminal character. The lasting effect of the injury is at most but slight, not interfering with the power of the appellee to earn a living or transact any business; and upon a careful consideration of all the testimony and circumstances of the case, the verdict can but be regarded as so flagrantly excessive as to demand the interposition of an appellate tribunal."

On the question as to contributory negligence the court said: "The right of a person to recover damages for a personal injury is

not affected by his having contributed to it, unless he was in *fault* in so doing. He may indeed not only contribute to it, but be the immediate cause of it, and yet recover. Thus, if a passenger, under a reasonable apprehension that a collision or other accident is imminent, changes his position to one in fact more dangerous, or even leaps from the vehicle while in motion, yet he may recover damages if he be injured; and this is true even though it may afterward appear that if he had sat still he would not have been injured. One is not bound, under such circumstances, to exercise all the prudence and care that ordinarily characterizes the conduct of a prudent man." *Judgment reversed.* Opinion by HOLT, J. J. C. BENTON (W. W. CLEARY, of counsel), appeared for appellant; HALLAM & MYERS, for appellee. *Court of Appeals, Kentucky, December Term, 1886. South Covington and Cincinnati Street R'y Co. v. Ware, 84 Ky. 267.*

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. RICKETTS.

Court of Appeals, Kentucky, January, 1892.

[Reported in 93 Ky. 116.]

ALIGHTING FROM TRAIN ON SIDE FURTHEST FROM STATION PLATFORM—FALLING OVER OBSTRUCTION.—A passenger who in the night time instead of alighting from a train on the side where there was a well lighted platform, got off on the opposite side where there were no platform or lights just to save going a distance of eight feet, and while walking alongside the train, stumbled over a water-box and in falling threw out his arm and it was run over by the train, cannot recover for the injury, as it was due to his own negligence in alighting on the dark side of the train that had stopped for four minutes, which was ample time for him to have got out of the way of the train had he gotten off on the platform side (1).

APPEAL, by the railroad company. The facts are stated in the opinion. *Judgment reversed.*

W. J. LISLE, for appellant.

JOHN D. FOGLE, for appellee.

Bennett, J.—The appellee was a passenger on the appellant's passenger train from Louisville, Ky., to Lebanon, Ky. The train

1. In **LOUISVILLE & NASHVILLE R. R. Co. v. WOLFE**, 80 Ky. 82 (1882), it appeared that plaintiff while removing a box of freight from defendant's depot to his wagon,

fell into a hole on the platform (the same defect being alleged to be known to defendant) and injured his leg. Judgment for plaintiff for \$2,000 affirmed.

arrived at Lebanon about 11 o'clock at night. The platform of the depot at Lebanon is on the left hand side of the track. There was, at one time, an old platform on the right hand side of the track at said depot, which was removed by the appellant about a year before the happening of the accident complained of; and the place was leveled off and cinders placed upon it. The appellee, before the old platform was removed, had gotten off the train on the right hand side. On the occasion of the accident the appellee knew that the passenger platform at the depot was on the left hand side of the track. And the platform, including the usual passenger way to and from it, was well lighted by lights from the depot building, and by the light from two street lamp-posts, all of which the appellee was bound to know and could see for himself. The appellee's travelling companion—Mr. Gibson—got off the train at the depot on the passenger platform on the left hand side of the train and went on his way; but the appellee got off on the right hand side, where there was no platform and no lights. He preferred to get off on the right hand side because it saved about eight feet distance and his having to walk around the locomotive, or waiting until the train moved on. When he alighted from the railroad coach, it being dark, he walked on the cinders along with the moving train, and close to it in order to see. And while thus walking he stumbled over a water-box and fell, and in the fall, he threw out his arm and one of the wheels of one of the cars ran over it, and the arm had to be amputated. As said, the appellee knew that the passenger platform was on the left hand side, and lighted. He also knew that there was no passenger platform on the right hand side, and that the right hand side was not lighted.

It appears, however, that the appellee, who was familiar with the depot grounds, and others who were familiar with it, had sometimes, as a matter of convenience to themselves, gotten on and off the train on the right hand side. It also appears that the train stopped at the depot at least four minutes.

The court, upon the foregoing facts, at the instance of the appellee, instructed the jury in substance, as follows: That the appellant was bound to keep in a safe condition and lighted in the night, all portions of their platform and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers leaving the cars or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go, etc. That it was the duty of the appellant, in stopping at stations,

to give passengers a reasonable time to safely get on and off said trains and out of the way of danger before starting said trains.

The first of the foregoing instructions is taken verbatim from 2 Wood on Railway Law, § 310, page 1166. But the same author, in speaking of the duty of the company in reference to its passenger depots and platforms, explains the rule thus given as follows: "But where the company has a platform and other facilities for entering and leaving the cars with safety on the depot side of the track, the failure to have the opposite side likewise prepared as a place for entering and leaving the cars cannot be regarded as negligence; it may select and adhere to such arrangement of its depots and platforms as it may see fit, if those made are safe and commodious."

The foregoing rule is so well and uniformly sustained by the authorities, and is so full of practical wisdom—doing even-handed justice both to the company and passenger—we do not hesitate to adopt it.

Here the company's platform was on the left hand side of the track, and it was "safe and commodious" and well lighted; and the appellee, by the use of ordinary prudence, could have left the cars and depot grounds with reasonable safety had he taken the platform side; but he preferred to leave the cars by the right hand side of the track, where there was no platform and no lights, and the company not being bound to erect a platform on that side and keep it lighted in the night time, having erected a safe and commodious platform on the other side, which was well lighted, his thus leaving the cars was at his own risk and peril. His having theretofore entered and left the cars by the right hand side, and others having done the same thing, cannot have the effect, under the circumstances of this case, to make it the duty of the company to have that side lighted, etc., because the appellee knew, and could see, that the left hand side was a safe and commodious way and designated by the company for the passengers to leave the cars, and not the right hand side. Hence he took the right hand side at his peril. As said, the train stopped at least four minutes, which was ample time in which to leave the car and get out of the way of the train had the appellee gotten off on the platform side and not on the dark side, where his exit was retarded by being compelled to find his way in the dark, which caused the injury complained of, for which, as said, the company is not responsible.

The judgment is reversed, and the case is remanded with directions for further proceedings consistent with this opinion.

SUMMERS v. CRESCENT CITY RAILROAD COMPANY.

Supreme Court, Louisiana, March, 1882.

[Reported in 34 La. Ann. 189.]

PASSENGER'S ARM INJURED WHILE ON WINDOW SILL OF CAR—CARRIER LIABLE.—Plaintiff, whilst riding in one of the defendant company's cars, had rested his arm on the sill of the open window, out of which his elbow thus projected a few inches. Another car of the company, coming down the adjoining track, as it passed by, struck plaintiff's arm and broke it, the intervening space between the two cars, at that particular point of the road being so narrow as to cause the accident. *Held*, that the company, as a carrier of passengers, should have taken the proper precautions to avoid such accidents and is responsible for the damage suffered by the plaintiff. *Held, also*, that there was no contributory negligence in the position of the plaintiff (1).

APPEAL from the Sixth District Court for the Parish of Orleans. The facts appear in the opinion. *Judgment affirmed.*

L. L. LEVY and T. J. SEMMES, for plaintiff and appellee.

JOHN M. BONNER, for defendant and appellant.

Fenner, J.—On the 20th of October, 1877, at between 2 and 3 o'clock, P. M., plaintiff became a passenger on car No. 18, of the defendant, a street railroad company, and, there being few passengers, seated himself with his body inclined towards the front of the car, his side towards the open window, upon which his left arm rested with his elbow projecting out of the car a few inches. While

1. **MOORE v. EDISON ELECTRIC ILLUMINATING Co.**, 43 La. Ann. 792 (1891), was an action for damages for injuries to a passenger, who, while on the car, put his head out of the window and was struck by an electric pole. Judgment for plaintiff for \$750. On appeal verdict quashed, judgment reversed and judgment directed for defendant, it being held that plaintiff's act was negligent, and the accident would not have happened had he used due care and prudence.

Passing from one car to another.—In **BEMISS v. NEW ORLEANS CITY**

& LAKE R. R. Co., 47 La. Ann. 1671 (1895), it was held to be negligence to go from one car to another while the train is in motion. If a passenger on a train in motion attempts to go from one car to another and is thrown from the platform by the sudden jerk of the train, the railroad company is not liable. In such a case the defective coupling of the train will not justify a verdict in favor of plaintiff, as the passing from one car to another is the proximate cause of the injury. Judgment for plaintiff for \$7,400 reversed.

thus situated, the said car No. 18, at a certain curve in the track, met car No. 4 of the same company, coming down an adjoining track of defendant, and in passing each other at this point, the last-named car struck defendant's elbow, breaking his arm and otherwise injuring him, for which injuries he seeks redress in this action for damages.

The action rests upon the charge, that the plaintiff's injury was caused by the fault or negligence of the defendant. The defense is two-fold: 1. Denial of negligence on the part of defendant; 2. Assertion of contributory negligence on the part of plaintiff.

Evidence responsive to pleadings, establishes the following essential facts:

Defendant's original contract with the city, passed in 1865, authorized the construction of a double track railroad, commencing on the neutral ground of Canal street at its junction with Magazine street, and required that "the tracks shall be three feet distant from each other, from out to out of rail." The road was built, and a turntable constructed at the corner of Canal and Magazine.

By city ordinance, approved October 14th, 1867, defendant was "authorized and required to extend its road to the intersection of Canal and Camp streets, and to establish a stand and turntable" at that point, "the city surveyor to furnish the lines and levels for the extension, and to give full directions how the work is to be done, etc."

Legal obstructions prevented the building of this extension until 1873, when application was made to the then city surveyor to furnish lines and levels for the work.

The testimony of that officer, and of his employees, is quite positive, that they staked out the work from Camp street, to a point near the then existing turntable of the company, beyond the intersection of Magazine street, but did not complete the lines to the actual junction with the old road, because it would have interfered with the operations of the road during the construction; that after the part staked out had been built, they expected to be called on to complete the lines and levels; but that they were never so called on, and never laid out the additional work, which was done by the company without their knowledge. In this intervening space, is found the curve on which the injury to plaintiff occurred, and it is established by the report of experts appointed by the court that, at the narrowest point on this curve, the distance between the tracks is only two feet four and one-half inches "from out to out of rails," instead of three feet as required by the original contract.

Car No. 18, in which plaintiff was at time of injury, was of the class and size of cars ordinarily used by defendant and other city railroads. The report of experts shows the width of its body to have been 7 feet $3\frac{1}{2}$ inches, and the length 14 feet 2 inches.

Car No. 4, which collided, was one of four special summer cars, bought by the defendant within four years prior to the accident, of which two were occasionally, and at certain seasons only, run over this portion of defendant's road. It was much larger than the ordinary cars, having a width of body of 7 feet $11\frac{1}{2}$ inches and a length of 16 feet $1\frac{1}{2}$ inches.

The original contract of defendant required that "the cars shall be similar to those used on other city railroads." The evidence is not very distinct as to what kind of cars were in fact "used" on other existing roads at the date of the contract; but it shows that defendant, from the commencement of its operations, had used cars similar to, or not substantially variant from, car No. 18 in size, up to the date of purchase of the four cars of exceptional size above referred to, which were the only ones it ever used substantially differing from car No. 18.

The report of experts shows that when cars Nos. 4 and 18 were placed at rest, and side by side, on this curve, there was a distance between the uprights of their respective windows of $4\frac{1}{4}$ inches. It appears, however, from the evidence, that when in motion, the wheels of each car have a lateral play on the rails of $1\frac{1}{2}$ inches; that the bodies being mounted on india-rubber springs, have a slight additional lateral play; and finally, that the bodies of the cars project several feet in front of the wheels, so that (the curve in each track being inward toward the other track) in passing the curve, as the bodies are only deflected when the wheels reach the successive points of curvature, an additional proximity is created between the cars in passing each other. All these elements concurring, it is evident that, under conditions likely to occur, cars Nos. 4 and 18, in passing, at the same time, the narrow point of this curve, might graze, if not collide with, each other; and there is some evidence tending to show that, on this particular occasion such collision did actually occur. This, however, is disputed, and is of no consequence.

The evidence, as well as common observation, establishes that it is a customary practice for persons riding in the street cars of this city, when not crowded, to sit with an arm resting on the window and projecting more or less outside of the car. This practice is suggested, if not invited, by the construction of the windows,

which are of a height that renders such a position easy and comfortable, and also by the natural inclination to face the direction in which one travels, to look out at passing objects, and, in a climate like ours, to turn the face so as to catch the breeze. The practice is so common that no one could possibly ignore its existence. Under customary conditions of construction universally prevalent here, the distance between parallel tracks and between passing cars is such as to render the practice absolutely free from danger of such collision as that which injured plaintiff. It does not appear that there is any point on any railroad in the city where cars would pass each other so closely as to expose a person in the position of plaintiff to the slightest danger. It is affirmatively shown that there is no such point on the line of defendant except this particular one, and even there, the injury could not have happened but for the exceptional width of one of the cars.

It appears that on certain roads where tracks are bordered by avenues of trees, rendering such exposures of the person perilous, care is taken to post notices or to construct wire screens to prevent them. Upon the up-town portion of defendant's line, where the wide cars like No. 4 were more commonly used, defendant has given special instructions to its drivers to be careful in passing each other on a curve existing there although the tracks were three feet apart. But at this Canal street curve, with so much narrower space between the tracks, no such instructions were given, no notices of any kind were posted, no precautions taken, and, in point of fact, at the time of this accident, car No. 4 was passing the other car, in this curve, at a full trot, and without the driver's paying any attention to the position of passengers in either car.

We have been thus explicit in stating facts and circumstances, because, in cases involving questions of negligence, or that kind of fault which corresponds to the *culpa levis* of the civil law, the difficulty lies not so much in ascertaining the legal principles, as in applying them to particular states of fact.

We may, at the outset, say that the doctrine of contributory negligence on the part of plaintiff, as a valid defense in such actions, is too firmly rooted in our jurisprudence to be open to further question. *Quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire.* Where the injury results from the negligence of plaintiff and the negligence of defendant, in such manner that the negligence of each may be considered as a juridical cause of the injury, the law will not undertake to apportion either the blame or

the damage. As said by a learned judge, "the law has no scales to determine in such cases, whose wrong doing weighed most in the compound that occasioned the mischief," and by another, "the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct." Thompson on Neg., p. 1147.

It must be observed, however, that, in determining what constitutes negligence, precisely the same rules must be applied to the acts of defendant charged as negligence and to the acts of plaintiff charged as contributory negligence.

Definitions of negligence by text-writers and judges are almost as numerous as the text-books and decisions on the subject.

We venture, however, to give another, compounded from the definitions of negligence by Baron Alderson and by Mr. Wharton, and of the definition by the latter of "negligence as the juridical cause of injury." Wharton on Neg., secs. 1, 3, 73.

Juridical negligence is the *inadvertent* omission to do something which it would be the *legal duty* of a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, to do, or the inadvertently doing something which it would be the legal duty of a prudent and reasonable man not to do—such act or omission being on the part of a responsible human being, and being such as in ordinary natural sequence immediately results in the injury complained of.

This definition, though perhaps redundant, includes, unequivocally, all essentials, and excludes acts not properly within the domain of negligence. It excludes offenses or intentional wrongs. It excludes mere moral duties. It excludes irresponsible persons, of whom various classes are mentioned by Mr. Wharton. And it excludes all acts or omissions, which, though they may be negligent, with reference to certain relations or contingencies, have no *causal connection* with the injury complained of.

A man who commits a negligent act takes upon himself the risk of all injuries, which, according to common experience and in the exercise of reasonable foresight, might have been anticipated as the consequence thereof; but this is the extent of his responsibility.

As said by Mr. Wharton, "the particular damage is to be viewed concretely, and the question asked, 'was this in ordinary natural sequence' from the negligence? If so, the damage is imputable to the party guilty of the negligence." In the language of Lord

Campbell, "if the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong or the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action." *Gerhard v. Bates*, 2 El. & Bl. [490] 590 (1).

Applying these principles to the facts of this case, which we have so fully and carefully stated, the first question is:

Was the defendant guilty of negligence?

Assuming that defendant violated the law, *either* in constructing its tracks so closely together, *or* in using cars of the width of No. 4, that alone would be sufficient to establish its fault. But although the preponderance of evidence is decidedly in favor of this assumption, yet as it is vehemently controverted and not absolutely free from doubt, we prefer to rest our decision on broader principles.

As a carrier of passengers, it is elementary that defendant's duty was to exercise diligence, skill, care and foresight, to carry them safely. *Penn. Co. v. Roy*, 102 U. S. 451.

It was bound to know that its passengers, in common with those on other street railways, were in the habit of riding with their arms resting on the window and projecting outside of the car; that under the usual conditions of construction of parallel tracks in this city, this practice was free from danger of collision with passing cars on their respective tracks; that the width between its own tracks at this curve was exceptionally narrow; that the car No. 4, used by it was exceptionally wide; that such car, in running over that curve, was liable to meet another car; that, in such meeting, they would, under conditions perfectly probable, pass each other so closely as, if not to collide, to come very near touching; that, in such event, a passenger, in either car, occupying the position shown to be very commonly occupied, would inevitably be injured.

Knowing these things, a reasonable care for the safety of others would have dictated the duty of using precautions to avoid the

1. The facts in *Gerhard v. Bates*, 2 El. & Bl. 490, are: A promoter and managing director of a silver lead ore company issued a prospectus of the company, stating that the promoters did not hesitate to guarantee to the bearers and holders of shares in the company a minimum annual dividend of 33 per cent.: *Held*,

that he was liable to be sued for fraud by a person who was induced, by the statement, to become a holder of shares in the company, the representation being false, to the knowledge of the defendant, and it having caused damage and loss to the plaintiff.

danger. Sufficient precautions might have been used without any inconvenience to defendant. The curve was short, and but little delay would have been occasioned by forbidding their drivers to pass each other at that point; or by instructing them to drive slowly and give warning to exposed passengers; or by any other mode of effective notice. Defendant used no precaution of any kind. Its conduct presents every element of negligence, as defined by us. As well said by an able judge: "When we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make our act injurious is one which we can readily see, may occur under the circumstances and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury." *Fairbanks v. Kerr*, 70 Pa. St. 86.

We are next to inquire whether plaintiff was guilty of any contributory negligence.

The sole negligence charged is his act in sitting as he did with his arm resting on the window, and his elbow projecting out of the car. Applying the principles already enunciated to the facts stated, we are of opinion that there is a complete want of causal connection between this act and the injury. We cannot express the principles applicable in such a case more forcibly than was done by the court in the case last quoted: "We are not to link together as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen, in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury; but we are not justly called to suffer for it, unless the other event was the effect of an act, or was within the probable range of ordinary circumspection, when engaged in the act."

It seems to us manifest, under the circumstances of this case, that no ordinary circumspection or foresight would have suggested to the most cautious person, situated as plaintiff was, the slightest probability of danger from the meeting of a car on a parallel track. Seeing a car so approaching, he would have been perfectly justified according to all common experience, in diverting his attention and resting in the perfect confidence that it would pass without touching him.

If the car had jumped the track and had thus collided with the

exposed arm of plaintiff, a different question would be presented. *Quoad* such a contingency, the act of plaintiff might have been juridically negligent. A prudent man might well foresee the possibility of such an occurrence, and might well be held to have taken upon himself the risk of such a peril. But viewing the particular damage here suffered concretely, Mr. Wharton's question, "was it in ordinary natural sequence from the negligence," must be answered in the negative.

The cases relied on by defendant's counsel, as to similar exposures of person in steam railway carriages, have, in our opinion, no applicability here. They are founded upon the common experience, as Mr. Wharton justly says, "of the closeness with which cars on double tracks and switches must necessarily pass to each other." Wharton on Neg., § 360.

The slightest observation of the construction and operation of steam railways would serve to warn any one of the danger of such exposures resulting from the frequent proximity of tracks, as well as from other contingencies.

The precisely contrary result of observation and experience with reference to street railways in New Orleans, as shown by the evidence, removes this case from the operation of such authorities.

As to the *quantum* of damages, the evidence shows that plaintiff suffered a fracture of the *humerus* and a dislocation of the elbow; that he was under treatment and confined to his bed or room for about two months, enduring much pain and suffering; that notwithstanding skillful surgery, he is left with his arm permanently disabled, incapable of flexing it beyond an angle of 90 degrees, and then only with pain; his arm wasting for want of exercise, useless in feeding or dressing himself, or in his business, which is that of a tobacco weigher and sampler; occasioning him pain with every change of weather, and without hope of improvement.

We are not prepared to say that the verdict of the jury, awarding him \$7,500 as damages, is so excessive as to justify us in disturbing it. The application of defendant to remand the case on the ground of newly discovered evidence, is refused. It would require an extraordinary state of case to induce us to follow the precedent set in *Schneider v. Ætna*, 30 La. Ann. 1198.

Judgment affirmed, at cost of appellant.

Rehearing refused.

FRELSSEN AND WIFE V. SOUTHERN PACIFIC COMPANY.

Supreme Court, Louisiana, May, 1890.

[Reported in 42 La. Ann. 673.]

LIABILITY OF RAILROAD COMPANY—TEST.—In order to impose a liability on a railroad company, for the consequences resulting from the omission of an act by one of its employees, the test is not: whether, had the act been done, the accident would not have occurred; but whether the act omitted was one which it was the duty of the employer to perform.

DERAILMENT OF TRAIN—COACH OVERTURNED—BROKEN WHEEL—NOTICE TO CONDUCTOR—RAILROAD NOT LIABLE.—A conductor who is told by an ordinary passenger that he has heard an unusual loud noise and felt a jolt which has made the coach jump and aroused him, and who, after reasonable inspection, inside and outside of the car, does not become conscious of a cause of alarm and danger, is not bound to stop the train for an inspection. His failure to do so, and consequent injury sustained thereby, to a passenger by the derailment and capsizing of the coach caused by the breaking of a wheel under a car in front, is not such negligence as imposes on the company the obligation of indemnity for harm sustained. It is *damnum absque injuria* (1).

APPEAL from the Civil District Court, Parish of Orleans. The facts appear in the opinion. *Judgment reversed.*

L. L. LEVY, for plaintiff and appellee.

LEOVY & BLAIR, for defendant and appellant.

1. In **MAHER v. LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO.**, 40 La. Ann. 64 (1888), it was held that while courts may allow even liberal compensatory damages against railway companies, in cases of gross fault and negligence on their part, resulting in severe injuries to the passengers whom they have, for due consideration, undertaken to carry safely, those corporations surely are entitled to protection against exaggerated and apparently stale claims, where the injury received or damages suffered is slight or nominal. In such instances the allowance made ought to be merely just and reasonable.

So held in an action for damages for injuries to a passenger sustained by reason of the car jumping the track. The facts, as stated by the Supreme Court, are: "The allegations are that while the plaintiff, who was a passenger on the train from Baton Rouge to New Orleans, and had paid the fare, was seated in one of the coaches, the engine jumped the track, was overturned and thrown into a canal or ditch, some eighteen miles above New Orleans; that the result of this accident was such as to cause severe injuries to his body, forcing him to obtain medical assistance, to be confined to his bed for

Bermudez, Ch. J. — This is an action in damages for bodily injury sustained, in consequence of the alleged negligence of employees for whose acts the defendant is liable.

The plaintiff complains that, on the 16th of January, 1888, at 4 A. M., while she was a passenger on a sleeper attached to a train of the company, a wheel from under a coach in front of that on which she was riding, broke; that her sleeper became uncoupled, derailed and capsized; that, in the upsetting she received two cuts above the knuckle bone from the window glass; that she became unconscious, suffered considerably, was subjected to humiliations, had to take care of her injuries, was disabled for months and that scars remain and permanent disfigurement of her hand.

The charge is that the company failed to provide for careful servants, safe conveyance, and to use extraordinary diligence in the management and running of the train; that the accident occurred through the defectiveness of the fastenings and lack of durable appliances in the cars and giving way of the trucks and other defects and acts of negligence in the direction of the train, and damages to the extent of \$2,500 are claimed as pecuniary compensation.

In defense, the company contends, that it did provide a safe conveyance with proper equipments, as far as it could do so, with the exercise of the utmost care and skill, and that the accident was solely due to a latent defect in a wheel, which no human care or skill could have detected or prevented.

From a judgment allowing plaintiff \$750 defendant appeals.

The district judge succinctly recites the following facts found by him:

"The cause of the accident was the breaking of the wheel at a point about one hundred and thirty-five miles from New Orleans. It had been carefully inspected at Lafayette and showed no latent

five days, to suffer great bodily pain and otherwise cause him severe injury; that he suffered from contusions, which he continues to resent, to his spinal column, recurring at periodical times, with great pain, forcing him to cease from his work; that he was, at that date, occupying a position at a salary of \$1,200 per annum; that before he could report for duty he had to use appliances, and that he did so for thirty days;

that the accident occurred by the gross fault and negligence of the railway company, etc." Judgment for plaintiff for \$750. Defendant appealed. The accident was established and negligence was the cause of it. The court held (as above stated) as to what plaintiff was entitled to. Judgment amended by reducing allowance from \$750 to \$300 and, as amended, affirmed.

defects. The track was in good order. The train was properly equipped, the running gear and fastenings of the car were in good condition. The train was not running at an unusual rate of speed. The wheel accidentally broke from some hidden defect or cause, which human care and foresight could not prevent."

We concur in this finding, but differ from the reasons assigned conducive to an allowance of damages, in which our learned brother labors to show that the conductor did not, after the breaking of the wheel, stop the train, and that, had he done so, the accident would not have happened and the plaintiff would not have been injured. Under this theory, we think the duty of the conductor was extended too far.

There can be no doubt that, as it is shown, the wheel was manufactured in a proper manner by respectable manufacturers, and that like it, the axle was without blemish; that as no defect was revealed after the usual examination and test on the night of the accident and shortly before its occurrence, no fault could be imputed to the defendant, from which liability for the injury sustained could be attached. *Hutch. on Carr.*, 497, 508; 85 Ill. 80; 38 Mich. 546-8; 44 N. Y. 481.

The plaintiff does not appear to contest the condition of things found by the district judge or the law applicable to it; but her contention is that, as the conductor of the train had been seasonably warned by a passenger who had heard an unusual loud noise and felt a jolt which had made the coach jump, arousing him, and who had asked him to see about it, this official did not examine and stop the train, and that had he done so, he would have discovered the broken wheel, provided against the consequent danger, and thus would have prevented the accident.

The law seems clear that, when the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there ought to be a consciousness of the facts which raise the duty on the part of the person charged with its performance.

Railways are not liable for a mistaken exercise of judgment on the part of their employees in an emergency, nor for a failure on the part of their servants to act with the utmost promptitude when the circumstances are such as to afford no time for deliberation. *Patt. R'y Acc.*, p. 111, § 115.

In such cases, the party charging the omission must prove that the duty alleged existed, that the omission constituted a legal fault and that, had it been performed, the accident would not have happened.

The conductor, heard as witness, said that, upon the statement of the passenger, he immediately went back in the car, saw nothing unusual, stood on the platform, looked outside and discovered nothing; that he had just stepped into the second-class coach, when he saw the bell line jerk, and that he pulled the bell to stop; that he went back and got the passengers out of the car.

He also says that, in passing over a switch or a frog, a train makes a loud noise and that it is not an unusual thing for passengers to become alarmed and to report to him, in such cases, when there is no occasion for fear.

It is evident that had the conductor stopped the train when the passenger told him of what he had heard and felt, and had he looked into the exciting condition of things, he could have discovered the broken wheel, and the accident would not have occurred; but the question is not to be viewed in that light or from that standpoint.

The test of liability in most cases is not whether the conductor omitted doing something he could have done, and which if done, would have prevented the injury; but, whether he abstained from doing anything which, in the exercise of ordinary care and prudence, he conscientiously ought to have done and did not do, the omission of which caused the accident producing the injury.

The real and only question in the case is simply whether the conductor was conscious of the condition of things and was bound, on the mere statement of the passenger, to have stopped the train when he saw no occasion for it.

It appears from his statements and from the testimony heard, that he did not know that any accident had happened; that as soon as the passenger told him what he did, he took steps to inquire and ascertain, and afterward discovered no cause of apprehension. He was not therefore conscious.

There is nothing to show who that passenger was; whether he belonged to the ordinary class of travellers, or whether he was an *habitué* or an experienced railroad man, to whose statements or warnings in such a case serious significance could be attached.

The proposition is inadmissible that, on the simple statement of any first coming passenger that he has heard a loud noise and felt a jolt, a conductor, who has not thus heard and felt, who after instant search and examination discovers no subject of apprehension, is bound to stop a train at night for special and thorough inspection of its different parts.

Were it so, there is no telling how often he would have to do so on the journey.

We are therefore of opinion that, as it was not, under the circumstances, the duty of the conductor to have stopped the train, the company is not responsible for his failure to have done so, and that the injury sustained is *damnum absque injuria*, particularly as it consisted, as the plaintiff herself declares, of fright and a slight cut.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that there now be judgment for defendant with costs in both courts.

BURBANK V. ILLINOIS CENTRAL RAILROAD COMPANY.

Supreme Court, Louisiana, December, 1890.

[Reported in 42 La. Ann. 1156.]

STATIONS AND PLATFORMS—DUTY OF CARRIERS.—It is the duty of a railroad company to furnish safe and easy ingress and egress to and from their station houses and platforms to all persons who have business at said station houses. It is also its duty to keep said station houses and platforms in a safe condition (1).

PERSON NOT PASSENGER INJURED AT STATION—RAILROAD NOT LIABLE.—A person, who goes to the station house and on the platform, not for the purpose of any business, or to meet expected friends, or to see others depart, but as a mere spectator for his own pleasure and convenience, is there at his own risk and peril, and can not recover damages for personal injuries received in consequence of a defective platform. To entitle such a person to recover, he must show such gross and wanton negligence on the part of the company equivalent to intentional mischief.

APPEAL, from the Civil District Court for the Parish of Orleans. The facts are stated in the opinion. *Judgment reversed.*

B. R. FORMAN and CHARLES FORMAN, for plaintiff and appellee.
GIRAULT FARRAR, for defendant and appellant.

1. **DE MAHY V. MORGAN'S LOUISIANA & TEXAS R. R. Co.**, 45 La. Ann. 1329 (1893), was an action for damages for injuries to plaintiff's wife, sustained by her jumping from a passenger coach at a station to rescue her child, about three years old, who, while standing upon the platform, had fallen therefrom owing to jolt caused by coupling of cars. Plaintiff had verdict and judgment for \$20,000. On appeal verdict quashed and judgment reversed and

judgment rendered for defendant. Negligence charged was the failure of defendant to build a station house, and careless coupling of cars. *Held*, that the failure to build station house was too remote to furnish ground of action; the proximate cause of the accident was that a child of tender years was standing on the platform of the car where she ought not to have been; and that the coupling of the cars was not unreasonably violent.

McEnery, J. — This is a suit for damages for personal injuries received by the plaintiff by falling through a hole in the platform of the defendant company at the town of Tangipahoa on the night of the 23d of September, 1889.

There was judgment for the plaintiff for the sum of \$1,500. The defendant company appealed. The plaintiff, in company with two other ladies, visited the defendant's depot for the purpose of being present on the arrival of the 8 o'clock passenger train from New Orleans.

In her petition the plaintiff alleges that she was expecting friends on the train from New Orleans who might desire to stop at the boarding house of which she was the proprietress. On this important fact, in her testimony she is silent.

The ladies who accompanied her, state that the plaintiff was expecting no particular visitor, or visitors, that evening; but she went to the train for the purpose of seeing if there were any persons on the train who might wish to go to her boarding house. It is not stated in the petition, nor is there any evidence to show, that the plaintiff was in the habit of going to the train to solicit custom for her boarding house. It is evident from the statement of the witnesses, and from her silence as to the particular reason which induced her to go to the depot, that she had no defined purpose in going there. Her presence on the platform and at the depot was not for the purpose of transacting any business with the company, to receive freight, welcome friends, or for any purpose for which the depot had been built.

She was at the depot, it is true, by a general license from the company, in the absence of any express prohibition. It would not be practical for a railroad company, in the immensity of its business, to designate particular individuals who should be permitted to enter its depot. But there was no express or implied invitation to the plaintiff to go to the depot and on the platform.

Had the plaintiff been on the platform for the purpose of receiving expected guests, or on any other business connected with the railroad to transact which the platform was built, she would be entitled to recover damages for the injuries received from a defective platform, the result of the company's negligence. 34 La. Ann. 780; 37 La. Ann. 648; 39 La. Ann. 649, 800; Wharton, Neg., par. 652, 653, 654.

From the evidence in the record we think the fact is clearly established that the plaintiff was on the platform for pleasure only, and

not with the intention of transacting any business with the company or for the purpose of receiving friends expected on the train. Her presence on the platform was at her own risk and peril.

Railroad platforms are not made for the use of the public; and if persons not invited and having no business with the company are injured in consequence of a defect in the platform, they have no redress. *Wharton, Neg.*, par. 822.

There was no inducement offered by the defendant to plaintiff which was equivalent to an invitation to go upon the platform. Mere permission, because it is impossible to refuse it, is not an inducement or an invitation to enter on the premises of another. The person entering on the premises of another under such circumstances goes at his own risk, and enjoys the license subject to its attendant perils. The law does not impose the duty upon the owner to keep his premises in a condition of such repair as to suit the convenience of those who go there solely for their own pleasure, and who are not invited or induced to go upon them.

The defendant company, under the facts in this case, could only be made liable if the uncovered platform through which the plaintiff fell was in its nature a trap. *Wharton, Neg.*, par. 821.

There must have been on the part of the company such gross and wanton negligence that it was equivalent to intentional mischief. *Snyder v. Railroad*, 42 La. Ann. 302.

The station house offered ample accommodations for passengers and visitors on business. There was a waiting room for passengers, with all requisite appliances for egress and ingress. There was a graveled walk along the track, and between it and the depot, for passengers and visitors in waiting. From this walk an inclined plane reached up to the platform.

There were platforms on the several sides of the building. The south side platform was used exclusively for freight. The flooring on this had been taken up for repairs. There was a lamp at the north side of the building which threw a light along the west platform intended for the use of passengers. This light did not reach the south platform, which was at the south end of the building, and at right angles to the west platform.

The plaintiff was sitting on the edge of the west platform. She jumped to the gravel walk, and went to the end of the platform, at the south side, ascended the inclined plane, and fell through an opening in the south platform. The change of position by the plaintiff, it is alleged, was to get a better view of the inside of the

coaches as the train approached. But it seems this was a needless change of position if the plaintiff really intended to see people coming from the train. The gravel walk was specially designed for the purpose of going to or coming from the train. The part of the system of platforms through which plaintiff fell was dark; and this fact alone ought to have warned her of her danger. The absence of a light was at least a notice that no one was expected on that part of the platform. Being a freight platform, it was not to be expected that it would be used as a promenade.

In repairing this part of the platform around the depot, on the south side, and leaving it unprotected, we are of the opinion that the opening was not in the nature of a trap, and the defendant company was not guilty of that degree of gross negligence that was equivalent to intentional mischief.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered that the suit be dismissed at plaintiff's costs.

Rehearing refused.

KEITH V. PINKHAM.

Supreme Judicial Court, Maine, E. D., 1857.

[Reported in 43 Me. 501.]

STAGE COACHES—CARRIERS OF PASSENGERS.—Common carriers by stage are responsible for the safety of their passengers, where an injury occurs by their neglect, such passenger being in the exercise of ordinary care, and in no way contributing to the injury.

SEAT ON COACH—REQUEST OF DRIVER.—If an agent of a stage requests a passenger to take an inside seat at his peril, this does not excuse the driver from the exercise of ordinary care. Such passenger assumes only the peculiar risk of his exposed situation, but not those resulting from the negligence of the driver (1).

EXCEPTIONS were taken to the rulings of HATHAWAY, J., at *Nisi Prius*. *Judgment affirmed.*

This is an action brought by the plaintiff to recover damages for injuries sustained by the overturning of a stage coach, the defendant being a common carrier of passengers for hire.

1. In *HUNTER v. STEWART*, 47 Me. 419 (1859), an action for injuries sustained by the upsetting of a stage coach, judgment for plaintiff was re-

versed on the ground of erroneous instructions as to damages, the trial court charging that plaintiff, a young unmarried woman, might recover

There was evidence in the case tending to show that Nathaniel Crocker was agent of the defendant, and directed the loading of the coach on the night of the accident; that he, while so employed, requested the plaintiff to take an inside seat in the coach, there being one, but that he declined to do so, and remained upon the top of the coach, and that Crocker then informed him that if he continued in his seat outside, he must keep it at his own risk. There was also evidence tending to prove that said Crocker was in the employ of the defendant as a stage driver, on the route between Cherryfield and Bangor, but not on the route where the accident happened; that Robert D. Crocker was the stage agent, but had requested his brother Nathaniel to look after defendant's interest while he, Robert, was absent, and said Nathaniel happened to be at Machias on the night of the accident.

There was no evidence that plaintiff knew that Nathaniel was an agent or claimed to be an agent of the defendant; and there was evidence tending to prove that the plaintiff occupied the seat which he was directed to take by Withee, the driver of the stage coach which was overturned. There was evidence tending to show that Keith, the plaintiff, was acquainted with Nathaniel Crocker, and that the defendant had agreed to the employment of Nathaniel Crocker by his brother to act as his agent in the absence of R. D. Crocker. The defendant's counsel requested the presiding judge to instruct the jury that if Nathaniel Crocker, who claimed to be the agent of the defendant, requested the plaintiff to take an inside seat, there being a seat for him inside, and the plaintiff declined to take it, and the said Crocker informed him that if he remained in his seat he must do it at his own risk, that the plaintiff can recover no damages in this action. But the judge declined to give the requested instruction.

There was also evidence in the case tending to prove that there was want of skill, and negligence in the treatment of the plaintiff's arm, and malpractice by the surgeon who had charge of the case, and of neglect on the part of the defendant in the care of his arm,

damages for loss of prospects of marriage, when no such claim was made, nor notice given to defendant that same would be made.

EDWARDS v. LORD, 49 Me. 279 (1862), was an action for damages for injuries caused by the upsetting

of a stage coach. Judgment for plaintiff affirmed, defendant's exceptions to instructions as to liability of carriers being overruled. The court held carriers to the greatest care and diligence.

which was broken, and for the breaking of which the principal damages were claimed. But there was evidence the other way, and evidence tending to prove that the surgeon employed was a well educated physician in the regular practice of his profession; and was at the time of his employment in the case the family physician of the plaintiff.

The presiding judge instructed the jury that if their verdict should be for the plaintiff he would be entitled to recover damages for the actual injury occasioned by the defendant's negligence; and that in estimating the damages they should take into consideration the natural and ordinary consequences of the injury received by the plaintiff, such as the loss of time, his necessary expenses for medical aid, and his pain and suffering, if any, occasioned by the injury, and also if they were satisfied by the evidence that the injury received caused a permanent disability they should consider that also as an element in estimating damages; that it was the duty of the plaintiff to have used ordinary care in the employment of a suitable physician, and following his instructions and taking proper care of himself; and if he did so, if by any malpractice of the physician, which would render him liable to the plaintiff for damages, the injury was increased and rendered permanent, that the defendant would not be liable to the plaintiff for any such additional injury caused by such malpractice of the physician; but that the defendant would not be relieved from his liability for the whole damages sustained by reason of any mistake or error of judgment of the physician, unless the mistake or error was such as would enable the plaintiff to sustain an action against the physician for malpractice.

J. A. LOWELL, for plaintiff.

B. BRADBURY, for defendant.

Appleton, J. — The plaintiff, to entitle him to recover, was bound to satisfy the jury that the injury for which he seeks to recover compensation occurred without fault on his part, and through the neglect or want of ordinary care and prudence on the part of the defendant or his servants.

No exceptions have been taken to the instructions given, which relate to the relative duties and obligations of the plaintiff and the defendant. They may thus be assumed to be correct.

The plaintiff, it seems, was riding on the outside of the defendant's coach when the injury in question was sustained. The counsel for the defendant requested the presiding judge to instruct the jury that if Nathaniel Crocker, who claimed to be an agent of the

defendant, requested the plaintiff to take an inside seat, there being a seat for him inside, and the plaintiff declined to take it, and the said Crocker informed him if he remained in his seat he must do it at his own risk, that the plaintiff can recover no damages in this action.

This requested instruction was declined, and, as we think, correctly. It may be true that the plaintiff, by riding outside, incurred the peculiar risks, if any there were, arising from his exposed situation. But that is all. He did not assume those resulting from the negligence of the defendant or those in his employ. He or they would not be exonerated from their duties, and if the plaintiff was injured through his or their neglect, he being in the exercise of ordinary and common care, in no way contributing to the injury by his position, he might well maintain this suit. The fact that the plaintiff took his position outside, was a circumstance proper for the consideration of the jury in determining whether his negligence contributed in any way to the production of the injury. But the requested instructions took from the jury all inquiries as to the defendant's negligence, and they were rightfully withheld.

The instructions as to damages were correct. If the defendant had desired them to be more explicit or definite in any aspect of the case, he should have made his requests to that end. Being correct so far as given, it is no cause of complaint that supposed instructions, but not requested, might have been given, which would have been correct.

Exceptions overruled.

STEVENS V. EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY.

Supreme Judicial Court, Maine, May 9, 1876.

[Reported in 66 Me. 74.]

TRAIN RUNNING OFF TRACK—PRESUMPTION OF NEGLIGENCE.—Where plaintiff was injured on a train by reason of the same being derailed, the fact of the accident happening is presumptive evidence of negligence against the railroad company, and the burden is upon the company to rebut the presumption by satisfactory evidence to the contrary (1).

ON MOTION. *Judgment affirmed.*

"Case brought to recover damages for personal injuries received on the defendant's railway, August 28, 1873.

"It appeared in evidence that the plaintiff was a passenger on the car of the defendant company, getting on at Bangor, that the car being about three-fourths full proceeded about twenty-five rods from the depot at a rate of speed from five to ten miles an hour, and then went off the track, producing a slight shock. It did not appear that the car was damaged, or that any of the passengers, except this plaintiff, received any injury. The passengers left the car, the plaintiff among others; and she walked to her house some four-fifths of a mile. She testified that she was fifty-four years of age and in good health when she entered the car, that the train commenced slatting soon after the cars started, slat her from right

1. In *DOWN v. GRAND TRUNK R'Y CO. OF CANADA*, 58 Me. 187 (1870), appeal from judgment for plaintiff in action for damages for being injured by reason of freight train being derailed, the question turned upon the point whether plaintiff was a passenger. The court said: "The plaintiff went aboard the freight train, in the saloon car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead

thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. Every one riding in a railroad car is, *prima facie*, presumed to be there lawfully as a passenger, having paid or being liable, when called on to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser." *Held*, that the railroad was liable for the safety of the passenger as if he were in their regular passenger train. Judgment affirmed.

to left, then stopped, jerked back and then pitched forward, that her back was thrown against the back of her seat, that she was also pitched on to the back of the seat in front; that she at first fainted and then recovered somewhat and was assisted out of the car; that by resting frequently on the way and receiving some support, she succeeded in reaching her home, took her lounge, had severe pain in the back, hip and head, sent for the doctor, took and kept her bed entirely for five days; that she got up very poorly, found she had received severe internal injuries from which she had not recovered. She introduced no evidence to show negligence on the part of the company.

"On the part of the defense, evidence was introduced tending to show that the car was comparatively new, the wheels and axle had been little used, were purchased of a company having a high reputation, were constructed of the best known materials and combining all the appliances which men skilled in the art of car construction employ; that the car and wheels and axle were duly and carefully inspected the night before and the morning when the train started; that the cause of the running of the car from the track was the loosening of the wheel; that this could not have been detected by the most careful examination; that the loosening of the wheel may take place when the wheel and axle have been manufactured with the highest degree of skill and of the best materials, and cannot be detected by the most careful inspection; cannot be detected either by the ear or eye; that it may be a latent defect not discoverable by the most careful examination and not possibly to be prevented by the highest skill in manufacturing.

"There was evidence that, before the suit was brought, the defendants paid the plaintiff \$275, and employed and paid a physician to attend her \$250.

"The verdict was for the plaintiff, \$1,625, which the defendants moved to have set aside as against law, evidence, its weight, and on the ground of excessive damages."

C. P. STETSON, for defendants.

A. SANBORN, for plaintiff.

Peters, J. — The defendants move to have the verdict set aside. There is a single ground upon which the verdict may stand. The accident occurred within a moment after the cars left the depot in Bangor, destined for St. John. It happened by a wheel being loose upon the axle under one of the cars, the train being thrown from the track thereby. The questions at the trial were: first, whether

the defect existed at the moment of starting, or whether it might have been produced while the cars were running afterwards; and if it existed before starting, whether it could have been discovered by the employees of the defendants by the use of proper and sufficient care. The latter question was a close one. The burden of explanation, however, that falls upon a company in a case like this, helps the plaintiff upon this point. Undoubtedly the general burden of proof is upon the plaintiff to show that her injury was caused by the negligence of the defendants. She avers it, and must prove it. Nor, in a strict sense, does the burden of proof change. *Small v. Clewley*, 62 Me. 155. But it may be aided and sustained by a presumption that arises upon the facts.

Where a passenger is in the use of proper care when an injury happens to him by the cars running off the track, the cause of the accident not appearing from the attending circumstances, it has been frequently decided, that negligence upon the part of the railroad company may be presumed against them, unless the imputation is removed by some satisfactory explanation upon their part. As the cars and the track are within the exclusive possession and control of the company, it is incumbent upon them to explain the cause of an accident, it not being ordinarily in the power of the passenger to do so. Cars can ordinarily be run with safety, and when they are not, that fact itself is evidence of fault or defect somewhere, requiring explanation. The maxim *res ipsa loquitur*, applies in such a case. *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; and cases there cited. *Stokes v. Saltonstall*, 13 Pet. 181 (1); *Railroad Co. v. Pollard*, 22 Wall. 341.

The question then comes, whether the explanation set up in this case is made out. If the defect existed at the depot before the train was put in motion, of which we think there was quite satisfactory evidence, were the jury justified in believing that it could have been there remedied by such caution and watchfulness on the part of the agents of the defendants as under the circumstances were required by common care? We are not convinced that the jury committed an error in this respect, giving the defendants the benefit of the interpretation of the rule as to common care, invoked by them and supported by the authorities by them cited. The defendants' witnesses do not swear positively that it was not within the limits of practicability to have discovered the defect before leaving the depot, if it existed then. The judgments of the experts are based upon

1. Reported in 7 Am. Neg. Cas. 297.

the statement that a proper and sufficient examination had been made by the employees, the correctness of which statement may well be doubted. If there are no means of discovering such a defect, it is, certainly, a deplorable risk for travellers. The truth is, that men who have routine work to perform often become careless. Undoubtedly, defects may exist in the running gear of railroads not discoverable by any of the ordinary tests applied for their detection; but we are not satisfied that the jury erred in coming to the conclusion that such was not the case here.

Upon the question of the amount of damages, we are by no means free of doubt, whether the verdict should be sustained. There is much reason to believe that the injury may be grossly exaggerated, and there is some question whether the plaintiff had previous good health enough to warrant her travelling upon the road. But as the testimony is very conflicting, as bearing upon this branch of the issues tried, we are disposed to allow the verdict to stand.

Motion overruled.

STATE v. MAINE CENTRAL RAILROAD COMPANY.

Supreme Judicial Court, Maine, December, 1888.

[Reported in 81 Me. 84.]

PASSENGER PASSING THROUGH CARS ON MOVING TRAIN—KILLED ON TRACK.—Where a passenger on a dark night, passed through the cars of a rapidly moving train, and was subsequently found dead on the railroad track, the facts were not such as to prove that his death was caused by falling through a space between the saloon and a passenger car, and judgment of nonsuit affirmed (1).

ON REPORT.

Indictment against defendant corporation for causing the death of one Lawrence J. Garcelon, August 20, 1886. Defendant pleaded

1. In *GOODWIN, ADM'R, v. BOSTON & MAINE R. R.*, 84 Me. 203 (1892), it was held that riding upon the platform of a passenger car upon a railroad, is such negligence on the part of the passenger as will bar recovery for injuries sustained by being thrown from the platform while rounding a curve.

In *HOBBS, ADM'R, v. EASTERN R. Co.*, 66 Me. 572 (1876), verdict

and judgment for plaintiff for \$5,000 was affirmed, where plaintiff's intestate was injured by falling from train at defendant's depot, while in the act of leaving the cars, the defendant's servants having suddenly, without warning, backed the train with great force, throwing the plaintiff's intestate under the wheels of the car.

not guilty. After the evidence for the State was out, and the State rested, the court ordered a nonsuit, upon motion of defendant's counsel, with the stipulation that if the law court were of the opinion that the evidence was sufficient to warrant a verdict for the State, the case should be sent back for trial.

F. E. TIMBERLAKE, County Attorney (E. O. GREENLEAF, with him), for the State.

FRYE, COTTON and WHITE, for defendants.

Peters, Ch. J.—The defendants are indicted for causing the death of Lawrence J. Garcelon by their negligence. The alleged negligence is that a saloon car was attached to a train of passenger cars in such a manner that a space was left between the saloon car and the car in front of it, through which the deceased fell. He was a passenger on an excursion train returning from Old Orchard to Farmington, and was last seen at the station of Livermore Falls, by another passenger who says he saw him at that station getting on the train just as it was put in motion. Other passengers saw him before reaching Livermore Falls, passing through a car in the direction of the rear of the train, about midway of the train. Nothing more was seen or heard of him until his dead body was discovered on the track by section men on the next morning. There was nothing said or done by him indicating any purpose of going to the rear of the train. There was no necessity for his going there. There were vacant seats in the passenger cars. The night was dark and the train was moving rapidly between stations. His body was found about four miles from Livermore Falls station and on the homeward side of still another station which had been touched by the train, on the track about midway between the rails, at a point in the road where there is quite a sharp curve, lying on his back with his legs drawn up and his left arm crushed above the elbow joint. There was no fracture of the skull, but there was a scalp wound on the back of his head, and there were bruises on his left side, and his clothing was badly torn.

The plaintiff contends that it is inferentially and circumstantially proved that the death was caused by the deceased falling between the saloon and a passenger car, the space between the two being by the estimation of witnesses about one foot and a half wide. The grounds upon which the inference is to be based are that he could not have fallen between any of the passenger cars because they were closely connected by the Miller patent platforms, and because his body would not have been found on the track if he had been

thrown sideways off any of the platforms between passenger cars. And it is contended that this position is strengthened by the circumstance that the deceased was thrown from the train at or near a curve in the road, where the motion of the cars would combine with the Miller platforms in preventing the body from falling upon the track, if the fall had been between passenger cars.

Whilst there may be some plausibility in these suggestions, they seem to us to fall short of establishing the alleged negligence, and that the death was caused thereby. It cannot be considered more than conjecture that the death was caused in the manner alleged. There are many ways in which the accident might be produced without any blame on the part of the defendants. He may not have been instantly killed, and in an insensible condition may have got himself upon the track after the injury, or may have been carried there by his clothing being caught by some part of the car or its running gear, and whether the motion of the train would carry him off the track or upon it would somewhat depend upon the resistance he may have at the moment exerted against falling, and the manner of such resistance, and other explanations or suppositions about the matter might be possible.

Moreover, no one knows, nor is there a thing to indicate, what care he was exercising, or what he was doing, or attempting to do, at the time of the accident. There were persons in the saloon car, and they saw or heard nothing which led them to suppose there had been this catastrophe. As before intimated, there seems to have been no occasion for his going to the saloon car. That car was evidently not intended for the use of passengers on that day, and was hitched to the train at Leeds Junction, to be transported to the upper end of the railroad route.

Further, we think it some evidence of carelessness on the part of the deceased, that he was rambling through the cars on such an occasion, in a dark night when the train was running swiftly, on a road having frequent and sharp curves, unless there be some excuse or justification for it more than mere restlessness or curiosity. Persons travelling on railroads should know something about cars and trains and their movements, and of the impropriety of exposing themselves unnecessarily to danger. It has been frequently held that it is improper for a passenger to loiter on the platform of a moving car, and passing from car to car is just as hazardous.

There is no need of our noticing the point whether it was improper to transport the saloon car in that way on that night, or not. That question we pass as immaterial to the result.

Nonsuit confirmed.

TOBIN V. PORTLAND, SACO AND PORTSMOUTH RAILROAD COMPANY.

Supreme Judicial Court, Maine, W. D., 1871.

[Reported in 59 Me. 183.]

PERSON NOT PASSENGER—HACKMAN INJURED AT DEPOT—

HOLE IN PLATFORM.—Where plaintiff, a hackman, carrying passengers to defendant's depot, was injured in stepping from his carriage into a hole in the platform at defendants' depot, the railroad company was held liable, the injury being caused solely by the negligent act of defendants in having their platform in an unsafe and dangerous condition, and plaintiff being rightfully at the depot (1).

ON EXCEPTIONS. *Judgment affirmed.*

"Case for damages occasioned by an alleged defect in a plank sidewalk or platform outside the defendants' station in Portland.

"The plaintiff was a hackman carrying passengers to the cars, and, driving up to the side of the defendants' depot in the day time, and stepping from his carriage to the platform, and turning his ankle, fell and sprained it, so that he was confined to the house a week, and afterwards was obliged to use crutches or a cane for thirteen weeks.

"There was evidence tending to show that in the platform the

1. In **KNIGHT v. PORTLAND, SACO & PORTSMOUTH R. R. Co.**, 56 Me. 234 (1868), it was held that where plaintiff's ticket entitled her to a passage over defendant's road to Portland, and by steamboat from Portland to Belfast, and defendant had built their track upon their wharf down to the steamboat, with a passage way on the wharf to the boat, which had been so used by the public, and plaintiff, while on her way to the steamboat at night, fell into a hole in the planking of the wharf, and was injured, defendant was liable in damages, they being bound to exercise the same degree of care in making the wharf safe for passengers to travel over, as is required of common carriers, although the passengers

were required to disembark at the depot, forty rods distant from depot, and that such duty continued until the passengers reached the steamboat. Judgment for plaintiff for \$2,500 affirmed.

In **STATE v. GRAND TRUNK R'Y OF CANADA**, 58 Me. 176 (1870), it appeared that a passenger left the train at a side track for a temporary purpose, and while crossing the main track to return to his train, was struck by an express train and was so injured that he died shortly after the accident. Judgment for the State reversed on the ground that evidence did not establish negligence of railroad, the passenger during his temporary absence assuming the risk of his act.

edges of two planks had decayed making a cavity or hollow, described by the plaintiff's witnesses as four to four and one-half inches wide and six inches long, and from an inch and a half to two and a half inches deep, and in the middle of the length of the planks, and running to a point at the ends. And by the defendants' witnesses as being at the end of the planks, and beginning at a point extending some sixteen or eighteen inches to the end of the plank, where it had increased to the width of two to two and a half inches and the depth of an inch or an inch and a half in the deepest part, the edges being gouged out in a circular manner.

"That the plaintiff in stepping off his hack stepped into the cavity, which caused him to fall.

"That the platform was wholly in the limits of the street; that it was made and often repaired by the defendants; that the city never made any repairs on it; that a servant of the defendants, engaged in the baggage department and accustomed to sweep the ladies' room and the platform in question, had noticed the alleged defect four or five months before the accident complained of.

"That the defendants had been notified, long ago, that their platform was in the highway, and to remove it.

"The judge was requested to instruct the jury, that even if the cavity in the platform occasioned the accident, without contributory negligence on the part of the plaintiff, still the defendants were not liable to the plaintiff; and that the defendants were not responsible for the condition of the platform.

"He declined to give the instructions prayed for, but instructed the jury:

"If they find that defendants, being common carriers of passengers, built and maintained the platform immediately adjoining their station solely for their own convenience, and that of their passengers, and other persons having business at their station, and not for the convenience of citizens passing along Commercial street, without the permission or direction of the city authorities, knowing said platform to be within the limits of the highway, then the defendants are responsible to persons induced to pass over said platform on business necessarily and immediately connected with their station, for the exercise of ordinary care and prudence in the repair of said platform, and for any damages solely, directly, and evidently incurred by any defect growing out of the want of such care on defendants' part, such person so injured being in exercise of ordinary care at the time.

"The jury returned a verdict for plaintiff, with damages assessed at \$650, and the defendants alleged exceptions."

BRADBURY & BRADBURY, for plaintiff.

N. WEBB, for defendants.

Appleton, Ch. J.—The plaintiff, a hackman, carrying passengers to the defendants' depot, was injured in stepping from his carriage into a cavity in the platform built and occupied by them. The jury have found that the plaintiff was without fault, and that the injury he sustained was occasioned solely by the neglect and want of ordinary care of the defendants in having their platform in an unsafe and dangerous condition.

The defendant corporation is bound to make the approaches over their own premises to their depot safe and convenient for passengers. They are bound to keep their platforms and landing places safe and convenient for all who make use of their cars as a means of conveyance. *Knight v. P. S. & P. R. R. Co.*, 56 Me. 505. They would be liable in damages for any injury occasioned by their neglect to any passenger who, on his part, was without fault. This is conceded by the able counsel for the defendants.

But the railroad corporation is bound not merely to keep these platforms safe for their passengers, but for all who have rightful occasion to use them. This obligation, arising from their public character and the duties resulting from their acceptance of a charter from the State, exists as to all rightfully upon their premises.

The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other. The hackman is there in the course of his business; but it is a business important to and for the convenience and profit of the defendants. The general principle is well settled, that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained against the individual so inviting and being in fault for the defect. *Barrell v. Black*, 56 Me. 498; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216.

It is objected that the defendants built the platform within the limits of the public highway. But it is no answer to the plaintiff, when seeking compensation for the consequences of their neglect,

that they have trespassed upon the rights of the public. They have built the platform and used it. Their passengers and those having rightful occasion to be upon it are there by their invitation, and they are responsible for its condition.

It may be that the city of Portland might be liable for a nuisance within the limits of their public highways, erected and maintained by the defendant corporation. But if so, the city would have the right of reclamation against those creating the nuisance. *Portland v. Richardson*, 54 Me. 46. Much more, then, could the party injured maintain his action directly against the corporation causing the injury.

Exceptions overruled.

PASSENGER INJURED IN UPSET OF STAGE COACH—DUTY OF CARRIER.—In an action upon the case, for the negligent driving and upsetting of a stage coach, by which the plaintiff was injured in his person and mind, brought by plaintiff against defendant, as owner of the coach, on August 13, 1841, there was verdict and judgment for plaintiff. On exceptions by defendant, the Court of Appeals discussed the points at some length and the judgment was reversed. The syllabus of the case reported in 4 Gill, 406, is as follows:

“In an action to recover compensation for injuries done to the person of plaintiff, by the negligence of the driver of a stage, which was thereby upset, the plaintiff cannot give in evidence, for the purpose of increasing the damages, that he had a wife and children.

“It is the duty of a stage owner, in the transportation of passengers, to have drivers of competent skill, who should use such skill with diligence, and the utmost caution and prudence; they must be well acquainted with the road they are bound to travel, furnished with well broken, safe, and steady horses; coaches and harness of sufficient strength, and properly made; the least failure in any one of those particulars, subjects the stage owner to the imputation of negligence, and makes him responsible for the injury or damage arising from such failure.

“A prayer which enumerates the facts, to comply with which, constitutes the duty of the defendant, and that upon a failure in any one of the particulars enumerated, if so found by the jury, then, in point of law, the defendant did not perform his duty, but was guilty of negligence, and is responsible for the injury sustained by the plaintiff from such failure, does not raise any question upon the pleadings; it merely asks the court to instruct the jury, that the hypothesis of the prayer is the law of the case, if supported by the evidence.

“In granting or refusing any prayer asking an instruction to the jury, that if they believe certain facts, the plaintiff is, or is not, entitled to recover, this court will not assume that the county court

inspected the pleadings in the cause, and adjudged their sufficiency to sustain the prayer.

"If either party designs to raise any question upon the pleadings in an action at law, their prayer under the Act of 1825, c. 117, should be framed with a direct reference to the pleadings.

"Where a prayer may have a tendency to mislead a jury in reference to the evidence in the cause, as where it only incorporates a part of the evidence which constituted the defense, when it should have incorporated the whole, and prays, that notwithstanding the jury should believe the part embodied in the instruction, still the plaintiff is entitled to recover, it is error to grant it.

"In an action to recover damages for a personal injury done the plaintiff, by the negligent driving and upsetting of a stage coach, the jury, in estimating his damages, are to consider what, before the injury complained of, was the health and physical and mental ability of the plaintiff to maintain his family, as compared with his condition in those particulars, after and up to the institution of the suit, in consequence of the injury complained of, and how far it is permanent in its results, as well as the physical and mental suffering he has sustained by such injury, and should allow such damages as, in their opinion, will fairly compensate the plaintiff for the loss and injury which they may find he has so sustained.

"Where a coach belonged to the R. line, which line belonged to the N. R. Stage Company, a co-partnership, composed of the firm of S. F. & Co. and of M. and B., and the firm of S. F. & Co. was composed of the defendant, and M., and others, and that all the drivers and coaches of the line belonged to the N. R. Company; that the defendant had no other connection with the line than as one of the firm of S. F. & Co., and was declared against, as the owner of the line, in an action upon the case, for the negligent driving of one of the coaches by him used and employed, and pleaded not guilty, there is no variance between the pleadings and the proof.

"The members of a firm are individually liable in actions of tort, for the acts of the firm, their agents and servants, and for such acts may be sued individually.

"To entitle the plaintiff to recover against the owner of a stage coach, for injuries sustained by him in his person, the jury must find that the injury to the plaintiff was occasioned by the negligence of the defendant, his servants or agents.

"The fact of the overturning of a coach is *prima facie* evidence of negligence; yet, if it was an accident against which human care and foresight could not guard, and was not the result of negligence in any degree, then the plaintiff is not entitled to recover.

"The law makes proprietors of stage coaches responsible for carelessness and negligence—want of due care—in the conveyance of passengers; but not, at all events, as in the case of common carriers.

"Where a plaintiff, after an injury sustained in his person from

the tort of the defendant, agrees with the defendant, or his agent, that in satisfaction of such injury, the defendant should pay the expenses incurred by the plaintiff by his detention, in consequence of his injury, and would furnish him with a free conveyance to his point of destination, and the defendant performs his part of the agreement, the plaintiff cannot recover further damages for the tort.

"In actions for general and unliquidated damages, the payment and acceptance of a sum of money, as a satisfaction, is a good bar.

"The party aggrieved may determine the sufficiency or insufficiency of the satisfaction paid and accepted by him.

"After a cause had been committed to the jury, and partly argued before them, on both sides, it was discovered that several interrogatories, propounded by the plaintiff to witnesses, under a foreign commission, had not been filed with the clerk of the county court, before they were propounded, nor copies served on the defendant, nor notice thereof in any way given him; but that they were first filed with the commissioners, at the place of executing the commission, it is too late, under the 20th rule of Baltimore County Court, to move to strike out the evidence of such witnesses which had been read to the jury.

"Where the court is of opinion that the plaintiff cannot recover, as where there is an admission of satisfaction of his demand, they will not, upon the reversal of the judgment, upon the appeal of the defendant, award a *procedendo*."

Judgment reversed. Opinion by SPENCE, J. WILLIAM SCHLEY and MCMAHON, appeared for appellant; MERDITH and REVERDY JOHNSON, for appellee. *Court of Appeals, Maryland, December, 1846. Stockton v. Frey*, 4 Gill (Md.), 406.

BALTIMORE AND OHIO RAILROAD COMPANY v. WORTHINGTON.

Court of Appeals, Maryland, December Term, 1863.

[Reported in 21 Md. 275.]

DERAILMENT OF TRAIN—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.—Where plaintiff was injured by reason of the train on which he was a passenger being derailed at a switch, and it appeared that the switch was in a position where the switch indicator could not be seen by the engineer in time to prevent an accident, and there was no switch-tender stationed at that point: *Held*, that the accident and the injury were presumptive evidence of defendants' negligence, and the burden was upon them to prove freedom from negligence (1).

1. **BALTIMORE & OHIO R. R. CO. v. STATE** (use of WILBY), 72 Md. 36 (1890), was an action to recover damages for death of plaintiff's intestate, a railway postal clerk, who was killed in a collision while riding in the postal car. Judgment for plaintiff for \$8,000 affirmed.

INSTRUCTION—NEGLIGENCE FOR JURY.—An instruction that it was for the jury to determine from the evidence whether the injury was the result of an accident, or an act against which human care could not guard, and not the result of negligence in any degree on defendants' part, and if so found then plaintiff was not entitled to recover, was properly given.

APPEAL, from the Superior Court of Baltimore City. The facts appear in the opinion. *Judgment affirmed.*

J. H. B. LATROBE, for appellants.

GEORGE H. WILLIAMS, for appellee.

Bartol, J. — In my opinion the appellants have no good cause to complain of the ruling of the Superior Court in this case.

Nothing is better settled, than that a judgment will not be reversed on account of the rejection of prayers, even though correct in themselves, if the instructions given to the jury are correct, covering the whole case, and giving the law to the jury, as favorably for the appellant as he is entitled to ask. 3 Gill, 481, 482; 11 Md. 451; 14 Md. 444; 13 Pet. 191.

That rule seems to me to be conclusive of the present appeal. The appellee, who was the plaintiff below, was a passenger on the railroad of the appellants, in the afternoon of the 7th of July, 1856. The train ran off the track at a switch, used occasionally by dirt trains, and the plaintiff was seriously injured by the accident, and instituted this suit to recover damages for the injury.

The evidence shows that the train was thrown off by the rail on the main track being displaced at the switch. It appears also from the evidence that the switch was at or near a curve, and on approaching it, in the direction the appellee was travelling, the indicator could be seen by the engineer, some of the witnesses say, at the distance of one hundred and fifty yards, others say two hundred and fifty yards; and that a train running at the usual speed of twenty-five miles an hour could be stopped in the space of from three hundred to five hundred yards, or according to the testimony of some of the witnesses, of one thousand yards. It is clear, however, from all the testimony, that in the position this switch was placed, the indicator could not be seen by the engineer upon a passing train, in time to prevent an accident, even if the indicator showed the misplacement of the switch. There is evidence in the cause showing that in this instance the lever of the switch, or indicator, was in the position it would have occupied had the track been safe, and therefore when seen by the engineer from the train,

gave no sign of the danger. How it got into that position is not explained by the testimony.

In this state of facts the Superior Court instructed the jury substantially as follows:

1st. That the injury to the plaintiff was presumptive evidence of negligence on the part of the defendants, and it was incumbent on them to prove that they were not negligent, in order to discharge themselves from liability.

2nd. That it was a question of fact for the jury to determine from all the evidence in the cause, whether the injury to the plaintiff arose *from any neglect* on the part of the defendants or their agents, and if the jury should find that the injury in question was the result of an accident, or act against which human care and foresight could not guard, and was not the result of negligence in any degree, on the part of the defendants, then the plaintiff was not entitled to recover.

3rd. That in determining these questions, the jury were to have regard to the character of railway transportation.

And 4th. That if they found there was no person in charge of the switch, and that the presence of such person might have prevented the accident; still the plaintiff is not, for that reason, entitled to recover; unless the jury should find that the want of such switch-tender was an act of negligence on the part of the defendants.

I have stated the substance of the instructions, omitting the formal parts, which properly left the facts to be found by the jury; and, in my judgment, there is no part of them of which the appellants have any right to complain.

The first proposition I do not understand to be controverted. The case of *Stokes v. Saltonstall*, 13 Pet. 181 (1), and *Stockton v. Frey*, 4 Gill, 414 (2), conclusively establish the law; that in such case the occurrence of the accident is *prima facie* evidence of negligence on the part of the defendants, throwing upon them the *onus* of rebutting the presumption, by proving there was no negligence. Of course that can be done only by proving the facts and circumstances explaining the cause of the accident, showing it to be such as could not have been guarded against by the utmost care and diligence; or in other words by proving, in the language of Chief Justice Shaw, "the most exact care and diligence, not only

1. Reported in 7 Am. Neg. Cas. 297.

2. See abstract of this case, page 414, *ante*.

in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers." 4 Cush. 402.

This is precisely the rule laid down in the court's instruction here, as embodied in the 2nd and 3rd proposition above stated. The jury were told that if the injury was the result of an accident, or an act against which human care and foresight could not guard, and was not in any degree the result of negligence, then the plaintiff was not entitled to recover. Much objection was made by the appellants in the argument, to this part of the instruction, upon the ground that it extended their liability beyond the obligations imposed on them by law, and would have the effect of destroying altogether the transportation of passengers by railroads.

But the very words of this instruction were used by Sir James Mansfield, C. J., in the case of *Christie v. Griggs*, 2 Camp. 81 (1), where, in speaking of the obligation for the safe carriage of passengers, he says: "His undertaking, as to them went no further than this, that *as far as human care and foresight could go*, he would provide for their safe conveyance." This language is cited with approbation by the Court of Appeals in *Stockton v. Frey*, and in that case the defendant had asked for an instruction in the words used by the judge in this case, which the Court of Appeals said it was error to refuse. It is a little remarkable that the instruction complained of here, as unduly enlarging the defendants' liability, was considered by the court in *Stockton v. Frey*, as an important qualification to the plaintiff's first prayer in that case, materially beneficial to the defendant.

But apart from the direct sanction to the language here employed, given in the case of *Stockton v. Frey*, I am of opinion as the result of the authorities cited, as well as from sound reason and public policy, that the measure of responsibility of railroad companies for the safe carriage of passengers, is correctly stated by the Superior Court in this case, especially when accompanied with the important qualification, that in passing upon the question of negligence, "the jury were to have regard to the character of railway transportation"; necessarily subject to greater perils and risks than attended the old, slower and simpler modes of conveyance.

1. In *CHRISTIE v. GRIGGS*, 2 Camp. 79, plaintiff was a passenger on defendant's coach when the axle-tree snapped and plaintiff was thrown off and injured. The court said the plaintiff had made a *prima facie* case by proving his going on the coach, the accident and the damage he had suffered.

With reference to the last part of the instruction, relating to the switch, which in this case was the cause of the accident, the appellants have no just cause to complain; the instruction, in my opinion, was more favorable to them than they were entitled to ask. The court left it to the jury to decide whether the absence of a switch-tender at that place was an act of negligence on the part of the railroad company. Looking at the facts of this case, as disclosed by the evidence, I should have little hesitation in declaring, as matter of law, that the failure of the company to have a switch-tender at that place, was an act of gross and culpable negligence, which would render the defendant liable for the consequences of such an accident as occurred in this case, if the jury should find that the presence of a switch-tender might have prevented it. Since the introduction of *indicators* at switches on railways, it could hardly be successfully contended that a railroad company could escape legal responsibility for the consequences of neglecting to provide so important and useful a safeguard against accidents. But what is the use of an indicator at a switch, which cannot be seen by the engineer in time to provide against the consequence of its being out of place? If a railroad company, for its own convenience, makes a switch at a place where an indicator is of no use, it would seem to me that even ordinary care and prudence would require them to employ at such a place, a person to attend to the proper adjustment of the switch. In this case the question of negligence in this particular was left to the jury, and furnishes no ground for a reversal of the judgment on this appeal.

The view I have taken of this case, renders it unnecessary to discuss the prayers offered by the appellants, because the same propositions being substantially given to the jury, in an instruction covering the whole case, their refusal, as I have said, would be no cause of reversal.

I consider the first prayer of the appellants as asserting the same measure and degree of obligation on the part of the company as that contained in the court's instruction. All that it was proper for the court to do in this case, was to furnish to the jury for their guide, the legal rule or standard by which the obligation of the company was to be determined—that is, to prescribe the degree of care and diligence required by law, and then to leave the fact of negligence, or want of care, for the jury to decide from the evidence in the cause; and it seems to me, notwithstanding all that has been urged in the argument, by the appellants' counsel, that the

rule in this respect, prescribed by the court's instruction, is quite as definite and certain as that contained in the first prayer.

The second prayer of the defendants was properly refused, because there was no evidence upon which it could be based. The bill of exceptions contains no testimony tending to show any wrongful act on the part of any one, not connected with the defendants, contributing to the accident by displacing the switch. But if I am in error in this, still the defendants had the benefit of that defense, under the court's instruction, which exempted them from liability for any act against which human care and foresight could not guard; and farther than that they are not entitled to exemption.

Finding no error in the ruling of the Superior Court, I think the judgment ought to be affirmed.

COCHRAN, J., also delivered an opinion in which he concurred with BARTOL, J.

BOWIE, CH. J., dissented, and in a lengthy opinion, cited many authorities.

PASSENGER'S ARM OUT OF WINDOW OF CAR—CONTACT WITH FREIGHT CAR—CONTRIBUTORY NEGLIGENCE.—If a passenger of mature years, voluntarily or inattentively projects his elbow or arm out of the window of a railroad car in which he is travelling, and it is injured by coming in contact with a freight car standing on a siding near the main track of the railroad, he is not entitled to recover damages for such injury from the railroad company. The placing of his arm out of the window, is an act of contributory negligence on his part, and the court should so instruct the jury, as matter of law, notwithstanding the company may have been guilty of negligence in permitting the car on the siding to be placed too near the track of the passing trains.

But where there is a conflict of testimony as to how the plaintiff's arm came to be thus exposed, whether as stated by him, or by the witnesses for the defense, this is a question of fact to be determined exclusively by the jury.

In such action the jury in estimating the damages, are to consider the health and condition of the plaintiff before the injuries complained of, as compared with his then condition in consequence of such injuries, and whether they are in their nature permanent, and how far they are calculated to disable him from engaging in those business pursuits, for which, in the absence of such injuries he would have been qualified; and also the physical and mental suffering to which he has been subjected by reasons of his injuries, and to allow such damages as in their opinion will be a fair and just compensation for such injuries.

Judgment for plaintiff for \$6,000 reversed on the ground of error in refusing certain of defendants' requests to charge and in giving misleading instructions. Opinion by MILLER, J. JOHN K. COWEN and THOMAS J. MCKAIG, appeared for appellant; J. H. GORDON, for appellee. *Court of Appeals, Maryland, October Term, 1873. Pittsburg and Connellsville R. R. Co. v. Andrews*, 39 Md. 329 (1).

PASSENGER INJURED WHILE TRYING TO CLOSE DOOR OF RAILROAD CAR—RAILROAD LIABLE.—In an action to recover damages for injuries sustained by plaintiff in trying to close the door of a car while the train was passing through a tunnel, judgment was rendered for plaintiff. On appeal the court, in the course of its opinion said (per IRVING, J.): "The appellee sued the appellant in Baltimore City Court for injuries sustained whilst he was a passenger on appellant's road, by reason of the negligence of the appellant. Two questions only are presented for determination. The appellant offered two prayers. First, that there was no legally sufficient evidence of negligence on the part of the appellant; and second, that upon the undisputed facts the appellee was guilty of contributory negligence which barred his recovery. The court rejected these prayers, and granted the appellee's two prayers, the first of which recited the facts deemed necessary to be found by the jury, to find for the plaintiff, and the other laying down the measure of damages in case they found for the plaintiff. No objection is made to the form of either of these prayers of the plaintiff, if the court considers there was evidence legally sufficient to take the case to the jury.

"There is some conflict in the testimony in respect to some of the facts, on which the appellee bases his right to recover; but as it is a question of whether there was sufficient legal evidence to sustain recovery, if believed by the jury, it is only necessary to state the plaintiff's own testimony; for it must be assumed to be true, for the purposes of this decision. He states, that he took passage to the race grounds, at Pimlico, in a special train of the appellant, which was run from its principal station, Hillen Station, in the city of Baltimore, on the 29th of October, 1882; that he took the train,

1. **NORTH BALTIMORE PASSENGER R'y Co. v. KASKELL**, 78 Md. 517 (1894), was an action for damages for injuries sustained in a collision between a street car and a freight car standing on another track. It appeared that the street car was crowded with passengers, of whom plaintiff was one, and while being driven at a rapid rate jumped the

track and a collision ensued, and plaintiff's hand was mashed, he having hold of one of the uprights or sash between the windows of the car. On the trial there was verdict and judgment for plaintiff, which, on appeal, was affirmed. The court distinguished the *Andrews'* case (39 Md. 353) above reported, on the facts.

after buying his ticket, about noon; that the seat he occupied was a front seat in the car next to the aisle, on the left hand side of the aisle, the door opening toward that side; that he was near enough to the door to touch it, when opened, with his foot; that all the seats in the car were filled, and there were persons standing in the aisle and on the platform; that the train was very long and the whole of it was packed and crowded; that soon after the train started it entered the Baltimore and Potomac Railroad tunnel, when it became pitch dark in the car, there being no lights on the train; that the door of the car was open, allowing smoke and cinders to enter in great quantities, thereby incommoding the plaintiff and other persons in the car, who shouted 'shut the door'; that the train passed the first section of the tunnel with the door open (and witness thought it was open from the time it left Hillen Station), and so passed into the second section of the tunnel, which was very long; that the smoke and cinders were coming from the engine in large quantities, and that witness was choking from them, and all had suffered very much; that it was still pitch dark in the car, and persons were calling out 'shut the door'; that the door was not shut, nor was there any employee of the company in the car to respond to the request; that thereupon the plaintiff rose carefully from his seat, for the purpose of shutting the door, extending both hands before him carefully, and feeling in the darkness for the door; that just then, there was a swaying of the door, and it was thrown back against the plaintiff's right hand, and his right arm passed through the glass of the upper part of the door, cutting it very severely in many places, the most severe being across the wrist; whether the swaying of the door was caused by the motion of the car, or by some person on the outside of the door, witness could not tell; that this happened just after passing an opening in the tunnel, at which break the light was sufficient to enable him to see the door was open, and that there were persons standing in and about the doorway, some on the inside and some on the outside; that nothing could be done after the accident, because it was pitch dark, and nobody knew what had occurred; that feeling himself bleeding, he could only grasp his arm with his left hand and try to stop the blood till the train got into the light, when persons came to his assistance; that the train went through the tunnel 'very slowly; it fairly crept'; and it was so heavy that some distance out of town it stopped, and was divided because it was so heavy; that since the accident he has been deprived of the free use of his right hand, besides suffering great pain, and being subjected to great expense for medical attendance, etc.

"It appeared in the proof of the defendant that the running time for the passage of the tunnel was from six to seven minutes. This is a sufficient summary of the evidence for our purpose, and assuming its truth, we think there was no error in refusing to take the case from the jury because of the reasons stated in either of the prayers of the defendant.

"There can be no doubt, that it is the duty of railroads for the conveyance of passengers to take proper precautions, in the management, appointments, and discipline of their trains to secure the safety and reasonable comfort of their passengers. The passenger pays his fare, and in consideration thereof the company engages to take him to his destination with due care for his appropriate comfort and safety consonant with the exigencies of that kind of travel. The company knew the train had to pass through the tunnels of the Baltimore and Potomac Railroad. Lights were necessary for such a totally dark transit. The necessities of passengers might require light during the passage of them. No argument is needed to prove this. The officers of the train, testifying for the defendant, say there were lights in all the cars; but this is a question of evidence, and the plaintiff and another passenger say there were none.

"The imperative necessity for closing the windows, doors, and even the ventilators, when passing through tunnels, to prevent the otherwise inevitable discomfort from the smoke, cinders and gas, is notorious. The ordinary practice of the company to do that before entering a tunnel, as proved by the defendant's own witnesses, establishes the importance of such precaution. There were ten passenger coaches and but two conductors, and two brakemen on the train. When the cry was made, to 'shut the door,' there was no officer in the car to comply with the passengers' request, and the plaintiff was impelled by his discomfort to attempt to do it himself. Whilst we do not think or mean to say, that an officer should have been provided for every car, or that the omission to shut out the gas and smoke would of itself have given a right to passengers to sue for the discomfort and annoyance, yet we think all the recited facts and circumstances taken together, if found by a jury, would warrant the finding of negligence on the part of the defendant, and justify a verdict for the plaintiff, unless the plaintiff's conduct amounted to contributory negligence. This the court was asked by the defendant to say, as a matter of law, the plaintiff's action was, and barred recovery. We think the court below committed no error in declining to so instruct the jury. The plaintiff was sitting nearest the door, and was, therefore, subjected naturally, to more discomfort than fellow-passengers in remoter parts of the car. He received its full force and volume, as it came rushing in, before it diffused itself over the car. It choked him. Self-preservation prompted him to shut it out. It cannot be, that a man, under such circumstances, feeling himself suffocating or choking from the smoke, cinders and gas, must sit supinely, and endure, without making any effort to relieve present and prevent future physical pain. Shutting the door was the only remedy, and if, in his effort to do that which the company should have done for him, but did not, he acted with prudence and care he cannot be regarded as guilty, in law, of such contributory negligence as defeats his action. It is said it was imprudent because he knew there were persons about the door inside and out, and their presence there may have

been the immediate cause of the accident. If that were so, it cannot affect the question; for there were no seats for those persons, and it was the duty of the company to have seen that the doorway was not so obstructed by the crowd as to keep it open and inflict this discomfort on passengers, and prevent the doors being shut. The witness did not know he could not shut the door, or he would not have made the effort, we may fairly suppose; and his description of the manner in which he attempted to shut the door, indicates that it was with great care and caution; and the jury have so found; for that question was submitted to them at the plaintiff's own instance, in his first prayer. This is the plain and natural view of it" (1).

Judgment affirmed. (STONE, J., dissented.) THOMAS W. HALL, appeared for appellant; ALBERT RITCHIE, for appellee. *Court of Appeals, Maryland, October Term, 1883. Western Maryland Railroad Co. v. Stanley*, 61 Md. 266.

PERSON CROSSING TRACK AT DEPOT TO GET TO TICKET OFFICE STRUCK AND KILLED BY TRAIN.—In *BALTIMORE & OHIO R. R. Co. v. STATE* (use of CHAMBERS) 81 Md. 371 (1895), the facts were: There were two stations of the defendant company in the town of Brunswick known as the West and East Station. The deceased, after declaring to friends his intention to go to Washington, boarded, at midday, a local train of defendant, by jumping on the platform of a car next to the tender of the engine, at the West Station, and was carried half a mile to the East Station, whence a train started for Washington. Upon arriving there he went on a platform across the tracks toward the ticket office, and while so attempting to cross, a passenger train passing through the station at a rate of speed variously estimated at from 17 to 35 miles an hour, struck and killed the deceased. Other passengers were crossing the track at the same time and the deceased did not look out for approaching trains before attempting

1. *Riding on platform of street car.*—In *BALTIMORE & YORKTOWN TURNPIKE ROAD v. CASON*, 72 Md. 377 (1890), plaintiff, while riding on the front platform of defendant's street car, fell or slipped off, and his foot was crushed by the rear wheel of the car passing over it. Plaintiff made no effort to get inside the car, although there was ample room. Notices forbidding passengers riding on the platforms were posted in the cars, but plaintiff had not read them. The court held that plaintiff was guilty of contributory negligence and judgment for plaintiff was reversed.

Passenger on footboard of car, struck by electric pole.—In *STATE* (use of SHARKEY) *v. THE LAKE ROLAND ELEVATED R'y Co.*, 84 Md. 163 (1896), a passenger while standing on the footboard of car, preparing to alight, was struck by a pole between the tracks and sustained injuries from which he shortly afterwards died. In an action for damages the court ruled that the passenger was guilty of contributory negligence and rendered judgment for defendant, which, on appeal, was affirmed.

to cross. There was a conflict of evidence as to whether a bell was rung or whistle blown by the train that struck the deceased. On the trial there was judgment for plaintiffs for \$2,500, which, on appeal, was affirmed, the court holding that it was immaterial how deceased got to station if when at ticket office he was rightfully on way used by passengers; that from the evidence the jury might find that he went to purchase ticket and was not bound to stop, look and listen before crossing track; and that it was negligence to run trains through such station at high rate of speed.

INGALLS V. BILLS AND OTHERS.

Supreme Judicial Court, Massachusetts, March Term, 1845.

[Reported in 9 Metc. 1.]

STAGE COACH—CARRIER OF PASSENGERS.—Proprietors of coaches, who carry passengers for hire, are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect which could not, upon such examination, have been discovered.

DEFECTIVE COACH.—A passenger in a coach received an injury solely by reason of the breaking of one of the iron axletrees in which there was a very small flaw, entirely surrounded by sound iron one-fourth of an inch thick, and which could not be discovered by the most careful examination externally. *Held*, that the proprietors of the coach were not answerable for the injury thus received.

LEAPING FROM COACH TO AVOID DANGER.—If a passenger in a coach, by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat (1).

ASSUMPSIT on an implied promise of defendants, as coach proprietors and common carriers of passengers, to convey plaintiff safely from Boston to Cambridge. *Judgment reversed.*

1. In *WARE v. GAY et al.*, 11 Pick. (Mass.) 106 (1831), under a declaration alleging that the defendants "so carelessly and negligently provided, fitted out, managed and conducted their stage coach, that while they were driving and conducting the same, it broke down," and thereby injured the plaintiff, who was

a passenger, the plaintiff proved, as the occasion of the injury, an insufficiency in the coach itself, the nut to secure one of the wheels being shown to be unfit for that purpose, in consequence of which the wheel came off. *Held*, that there was no variance. *Held, also*, that the above mode of declaring, not alleging in

At the trial in the Court of Common Pleas, before Williams, Ch. J., plaintiff introduced evidence tending to prove that, on September 23, 1841, he and several other persons took outside seats, as passengers, on the top of defendants' coach, to be conveyed from Boston to Cambridge; that on the way, in Court street, in Boston, while proceeding at a moderate rate, and without coming in contact with anything, or meeting any obstruction, the hind axletree of the coach broke, one of the hind wheels came off, and the coach settled down on one side, without being upset; that the plaintiff and some other outside passengers, being alarmed, jumped from the top of the coach upon the pavement; and that the plaintiff's left arm was thereby badly injured.

Defendants introduced evidence tending to prove that they had taken all possible care, and incurred extraordinary expense, in order that the said coach should be of the best materials and workmanship; that at the time of the accident, the coach, so far as could be discovered from the most careful inspection and examination externally, was strong, sound and sufficient for the journey; and that they had uniformly exercised the utmost vigilance and care to preserve and keep the same in a safe and roadworthy condition. But the evidence further tended to prove that there was an internal defect or flaw in the iron of the axletree, at the place where it was broken as aforesaid, about three-eighths of an inch in length, and wide enough to insert the point of a fine needle or pin—which defect or flaw appeared to have arisen from the forging of the iron, and which might have been the cause of the said breaking; that the said defect was entirely surrounded by sound iron one quarter of an inch thick; and that the flaw or defect could not possibly have been discovered by inspection and examination externally.

Upon this evidence, defendants moved the court to instruct the jury that it was the duty of defendants to use all possible care in

what particular the defendants were negligent in providing and fitting out the coach, was sufficiently certain. *Held, also*, that if in an action by a passenger against the proprietors of a stage coach, for an injury occasioned by the insufficiency of the coach, the plaintiff proves that while the coach was driven at a moderate rate upon a plain and good level road, without coming in contact with

any other object, one of the wheels came off and the coach upset, whereby the plaintiff was hurt, the law will imply negligence, and the burden of proof will rest upon the defendants to rebut this legal inference, by showing that the coach was properly fitted out and provided. Judgment for plaintiff for \$1,500 affirmed.

providing a good coach, in keeping the same in due repair, and in due examination into its condition; and if they took such care, and the accident happened, without any fault or negligence on their part, but by reason of a defect which they could not discover, then the verdict should be for them; and that plaintiff was not entitled to a verdict, unless the jury were of opinion that there was some degree of actual fault or negligence on the part of defendants.

The judge declined giving these instructions, but submitted the evidence to the jury, with instructions that defendants were bound by law, and by an implied promise on their part, to provide a coach not only apparently, but really, roadworthy; that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible and could not be discovered upon inspection and examination; and that if the jury were satisfied, from the evidence, that the axletree broke in consequence of the original flaw or defect in the interior thereof, and plaintiff was injured thereby, he was entitled to a verdict, although that flaw was invisible, and could not be discovered by inspection and examination externally.

Defendants further insisted, that if plaintiff jumped from the coach without necessity, and that necessity brought upon him by them, they were not liable; and that although a passenger might have jumped off without imprudence, still, if the plaintiff might have remained in his seat without imprudence, his jumping off was to be considered as his own act, and was done at his own peril.

Upon this point the judge directed the jury to inquire whether plaintiff's jumping off was, under the existing circumstances, an act of reasonable precaution; and instructed them that if plaintiff was placed in such a perilous situation, in consequence of defendants' failure to fulfill their obligations aforesaid, that, as a prudent precaution, for the purpose of self-preservation, he was induced to leap from the coach, the owners were answerable for any injury he might have sustained thereby, although it might now appear that he might, without injury, have retained his seat.

Verdict for plaintiff, and defendants alleged exceptions.

PARSONS and GREENLEAF, for defendants.

L. WILLIAMS and NUTTER, for plaintiff.

Hubbard, J.—The question presented in this case is one of much importance to a community like ours, so many of whose citizens are engaged in business which requires their transportation from place to place in vehicles furnished by others; and though

speed seems to be the most desirable element in modern travel, yet the law points more specifically to the security of the traveller.

Under the charge of the learned judge who tried this case, we are called upon to decide whether the proprietors of stage coaches are answerable for all injuries to passengers arising from accidents happening to their coaches, although proceeding from causes which the greatest care in the examination and inspection of the coach could not guard against, or prevent; or, in other words, whether a coach must be alike free from secret defects, which the owner cannot detect, after the most critical examination, as from those which might, on such an examination, be discovered.

The learned judge ruled that the defendants, as proprietors of a coach, were bound by law, and by an implied promise on their part, to provide a coach, not only apparently but really roadworthy, and that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination.

The law respecting common carriers has ever been rigidly enforced, and probably there has been as little relaxation of the doctrine, as maintained by the ancient authorities, respecting this species of contract, as in any one branch of the common law. This arises from the great confidence necessarily reposed in persons engaged in this employment. Goods are entrusted to their sole charge and oversight, and for which they receive a suitable compensation; and they have been, and still are, held responsible for the safe delivery of the goods, with but two exceptions, viz., the act of God and the king's enemies; so that the owners of goods may be protected against collusive robberies, against thefts and embezzlements, and negligent transportation. But in regard to the carriage of passengers, the same principles of law have not been applied; and for the obvious reason, that a great distinction exists between persons and goods, the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight, in the maintenance of their rights, which the owners of goods cannot do, who have entrusted them to others.

It is contended by the counsel for the plaintiff, that the proprietor of a stage coach is held responsible for the safe carriage of passengers so far that he is a warrantor that his coach is roadworthy, that is, is absolutely sufficient for the performance of the journey undertaken; and that if an accident happens, the proof of the greatest

care, caution and diligence, in the selecting of the coach, and in the preservation of it during its use, will not be a defense to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others cited, which are more especially relied upon, are those of *Israel v. Clark*, 4 Esp. 259; *Crofts v. Waterhouse*, 3 Bing. 319; *Bremner v. Williams*, 1 Car. & P. 414; and *Sharp v. Gray*, 9 Bing. 457. If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they cannot be viewed in the light of established authorities. But we think, upon an examination of them and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff, as has been argued.

It must be borne in mind, that the carrying of passengers for hire, in coaches, is comparatively a modern practice; and that though suits occur against owners of coaches, for the loss of goods, as early as the time of Lord Holt, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of *White v. Boulton*, Peake's Cas. 81, which was tried before Lord Kenyon in 1791, and published in 1795. That was an action against the proprietors of the Chester mail coach for the negligence of the driver, by reason of which the coach was overturned, and the plaintiff's arm broken, and in which he recovered damages for the injury; and Lord Kenyon, in delivering his opinion, said, "when these (mail) coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly." The correctness of the opinion cannot be doubted, in its application to a case of negligence. The meaning of the word "safely," as used in declarations for this species of injury, is given hereafter.

The next case which occurred was that of *Aston v. Heaven*, 2 Esp. 533, in 1797, which was against the defendants, as proprietors of the Salisbury stage coach, for negligence in the driving of their coach, in consequence of which it was upset and the plaintiff injured. This action was tried before Eyre, C. J. It was contended by the counsel for the plaintiff, that coach owners were liable in all cases, except where the injury happens from the act of God or of the king's enemies; but the learned judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by the custom; but as against carriers of persons, the action stands alone on the ground of negligence.

The next case was that of *Israel v. Clark*, 4 Esp. 259, in 1803,

where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach, in consequence of the axletree having broken; and one count alleged the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by act of parliament, that should be deemed such an overloading. To this Lord Ellenborough, who tried the cause, assented, and said, "if they carried more than the statute allowed, they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established." This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the jury found their verdict. But the point pending in the present case was neither discussed nor started, viz., whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it was stated that the defendants were bound by law to provide sufficient carriages for the passage, and, at all events, that there should be a clear landworthiness in the carriage itself.

The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The judge himself may have used stronger expressions, in the terms of "landworthiness in the carriage," than he intended by the thought of seaworthiness in a ship, and the duty of shipowners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed, as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

The next case was that of *Christie v. Griggs*, 2 Campb. 79, in 1809. There the axletree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury, said, "as the driver had been cleared of negligence, the question for the jury was as to the

sufficiency of the coach. If the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

The case of *Bremner v. Williams*, 1 Car. & P. 414, in 1824, is relied on by the plaintiff. There, Best, C. J., said he considered that "every coach proprietor warrants to the public that his stage coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." And so, in *Crofts v. Waterhouse*, 3 Bing. 321, in 1825, Best, C. J., said, "the coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But though this language is strong, and would apparently import a warranty, on the part of the stage proprietor, as to the sufficiency of his coach, yet Park, J., in the same case said, "a carrier of passengers is only liable for negligence." This shows that the court did not mean to lay down the law, that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same learned judge (Best), in the case of *Harris v. Costar*, 1 Car. & P. 636, in 1825, where the averment in the declaration was, that the defendant undertook to carry the plaintiff *safely*. The judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, and that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

But the case mainly relied upon by the plaintiff is that of *Sharp v. Gray*, 9 Bing. 457, where the axletree of a coach was broken and the plaintiff injured. There the axle was an iron bar enclosed in

a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood work; and it was proved that it was not usual to examine the iron under the wood work, as it would rather tend to insecurity than safety. It does not appear by the statement, that the defect could not have been seen, on taking off the wood work; but it would rather seem that it might have been discovered. However that may be, the language of different judges, in giving their opinions, is relied upon as maintaining the doctrines contended for by the plaintiff. Gaselee, J., held that "the burthen lay on the defendant to show there had been no defect in the construction of the coach." Bosanquet, J., said, "the chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequence upon the same principle as a shipowner who furnishes a vessel which is not seaworthy." And Alderson, J., said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, nor be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. But we incline to believe the learned judges gave too much weight to the comparison of Bosanquet, J., viz., that a coach must be roadworthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited, where a passenger has sued a ship owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the learned court, than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient

coaches, and keeping them in a safe and suitable condition for use, we cannot agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers, so far as the vehicle is concerned. But that the case of *Sharp v. Gray* is susceptible of being placed on the ground which we think tenable, namely, that negligence and not warranty lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice Park, who, in giving his opinion, says, "this was entirely a question of fact. It is clear that there was a defect in the axletree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not." And *Tindal, C. J.*, who tried the cause before the jury, left it for them to consider whether there had been that vigilance which was required by the defendant's engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence and not of warranty. See also *Bretherton v. Wood*, 3 Brod. & Bing. 54, and 6 Moore, 141. *Ansell v. Waterhouse*, 6 M. & S. 385, and 2 Chit. 1 (1).

The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by reason of negligence. In the case of *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. 626, the court say that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again in the case of *Hollister v. Nowlen*, 19 Wend. 236, they say, that "stage coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the *passenger* and his *baggage*. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies."

In a case which occurred in respect to the transportation of slaves, *Boyce v. Anderson*, 2 Pet. 155, Chief Justice Marshall, in giving the opinion of the court, says, "the law applicable to common

1. The facts in the English authorities cited in the case at bar are sufficiently set forth in the opinion.

carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further, or applied to *new cases*. We think it has not been applied to living men, and that it ought not to be applied to them." So in the case of *Stokes v. Saltonstall*, 13 Pet. 181 (1), the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his *Treatise on Bailments*, secs. 592-600, with his usual learning; and his result is the same.

If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by Chief Justice Eyre and Chief Justice Mansfield are most consonant with sound reason, as applicable to a branch of the law comparatively new, and, though given at *nisi prius*, are fully sustained by the discussions which the same subject has undergone in the courts of our own country. We have said, as being most consonant with sound reason, or good common sense, as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and—from the number of artisans employed in the construction of the materials of a single coach—whom they could not follow. Unless, therefore, by the application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency and adaptation of his own manufactures to the uses designed—which, in a community like ours, could not be practically enforced—the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

If it should be said that the same observations might be applied to shipowners, the answer might be given, that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods entrusted to them. But as it respects the seaworthiness of a ship, the technical rules of law respecting it have been so

1. *STOKES v. SALTONSTALL*, 13 Pet. 181, is reported in 7 Am. Neg. Cas. 297.

repeatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the degree of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negligence; so that the evils are very few that arise from the maintenance of the doctrine that ship must be seaworthy in order to be the subject of insurance.

The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harness, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present case, were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested.

The point arising on the residue of the instructions was not pressed in the argument; and we see no reason to doubt its correctness, provided the peril to which the plaintiff was exposed arose from a defect or accident for which the defendants were otherwise liable. *Jones v. Boyce*, 1 Stark. 493 (1).

New trial granted.

1. It was held in *JONES v. BOYCE*, 1 Stark. 493, that if, through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger is placed in so perilous a situation as to ren-

der it prudent for him to leap from the coach, whereby his leg is broken the proprietor will be responsible in damages, although the coach was not actually overturned.

SNOW v. FITCHBURG RAILROAD COMPANY.*Supreme Judicial Court, Massachusetts, February, 1884.*

[Reported in 136 Mass. 552.]

INJURED AT STATION BY MAILBAG THROWN FROM TRAIN.—

If a passenger, while waiting on a railway station platform to make a necessary change from one train to another, is struck by a mail bag thrown from one of the company's cars by a mail agent in the employ of the United States, on a train moving at the rate of thirty miles an hour, and the practice of throwing out mail bags was known to the company, it is liable for the injuries sustained (1).

"TORT for personal injuries occasioned to the plaintiff, by being struck by a mail bag thrown by a mail agent in the employ of the United States, from a mail car belonging to the defendant on one of its trains. Trial in the Superior Court, without jury, before STAPLES, J., who found for the plaintiff; and the defendant alleged exceptions."

W. S. STEARNS, for defendant.

J. T. JOSLIN (G. A. KING with him), for plaintiff.

Colburn, J.—The plaintiff was a passenger on the railroad of the defendant, and properly on the platform at the station, waiting to make a necessary change from one train to another. There is no claim that she was in an improper place, or in any way wanting in due care. The plaintiff sustaining this relation to the defendant, and being in this place, the defendant was bound to exercise towards her such care and diligence as could reasonably be exercised to protect her from such injuries as human foresight could anticipate and prevent.

The defendant voluntarily furnished a car to run on its express train, from which it knew that mail bags were to be thrown at

1. BRADFORD v. BOSTON & MAINE R. R., 160 Mass. 392 (1894), was an action for injuries to a person who, while on station platform, was struck by a mail bag thrown from a passing express train of defendant. The jury found for defendant. On exceptions by plaintiff the Supreme Court held that there was evidence that plaintiff was properly on the platform (she

having gone there to get a timetable) and was in the exercise of due care.

The contention in the **BRADFORD** case was that plaintiff was in an improper place on the platform and was either a trespasser or licensee, while in the **SNOW** case, above reported, there was no such contention, the plaintiff being a passenger.

the station where the plaintiff was, when the train was under full speed. Obviously, unless good judgment and great care were used by the mail agent in throwing out the bags, which had the momentum of a train moving at the rate of thirty miles an hour, or forty-four feet a second, danger was likely to result to passengers on the platform of the station.

There was evidence in the case tending to show that mail bags had not unfrequently been thrown from this car, in such a way as to strike upon the platform where the plaintiff stood; and if this evidence was believed, the court was justified in inferring that the defendant knew, or, in the exercise of proper care, ought to have known this. It was within the power of the defendant to prevent this practice of throwing out mail bags, if in no other way, by withholding the use of the car, or by stopping the train at the station. The case presented is unlike that of the act of a passenger, which the defendant had no reason to anticipate or power to prevent.

We are of opinion that the court was justified in refusing to rule, as requested by the defendant, that the plaintiff was not entitled to recover.

Exceptions overruled.

NOTE OF MASSACHUSETTS CASES RELATING TO PERSONS INJURED AT STATIONS.

Ice on Steps.—*LOOMIS v. NEW YORK, NEW HAVEN & HARTFORD R. R. Co.*, 159 Mass. 39 (1893), was an action for damages for injuries to plaintiff sustained by her falling upon icy steps in defendant's station. Verdict for plaintiff. Defendant excepted and was sustained by the Supreme Court, the court holding that certain letters bearing upon the place of the accident were admissible in evidence.

Falling on Track.—In *CASWELL v. BOSTON & WORCESTER R. R. CORPORATION*, 98 Mass. 194 (1867), it appeared that a passenger, while standing in a proper place to await the arrival of a train, having reason to believe, by the conduct of servants of the railroad company and passengers also standing there, that she was in imminent peril from the approach of the train in an unexpected direction by reason of the displacement of a switch through culpable negligence of servants of the company, became alarmed, and, in running away to escape the apprehended peril, fell and was injured. *Held*, that the jury were warranted in returning a verdict against the company, although the course which the plaintiff took in running off brought her into greater peril from the approach of the train than she would have been in had she remained where she was standing, and although the immediate cause of her fall was her tripping over the rail of the track on which she was running. Judgment for plaintiff for \$2,187.50.

Falling into Cattle Guard.—In *FORSYTH v. BOSTON & ALBANY R. R. Co.*, 103 Mass. 510 (1870), it was held that a passenger who alights at night from a train on a platform that extends alongside the track to a highway and has

a step at the end next the highway and instead of walking along the platform, steps from it with the intention of going obliquely across the track to the highway and falls into a cattle guard dug across the track and that it was too dark for him to see, cannot maintain an action for the injuries received.

Struck by Train.—In *GAYNOR v. OLD COLONY & NEWPORT R'Y Co.*, 100 Mass. 208 (1868), it appeared that a passenger on a dark night alighted from a train on a narrow platform between the main track and a side track and that on the other side of the train was the regular station, and the passenger, as other passengers had often done, attempted to cross the side track to the highway near by and was struck by the engine which had been uncoupled from the train upon which he had arrived and was being backed on the side track without a light to the engine house. *Held*, that the question of negligence was for the jury, and case ordered to stand for trial.

In *CHAFFEE v. BOSTON & LOWELL R. R. CORPORATION*, 104 Mass. 108 (1870), plaintiff, a season-ticket holder, had stepped from the station platform to the track to reach his train, when he was struck and injured by a hand car. The night was dark. There was evidence that plaintiff had looked up and down the track before getting off the platform. Verdict for plaintiff. Defendant's exceptions overruled.

In *WHEELLOCK v. BOSTON & ALBANY R. R. Co.*, 105 Mass. 203 (1870), it appeared that plaintiff, a passenger, in attempting to cross a track at a station to board a train on the further track, as other passengers were doing, was struck by a train that had given no warning of its approach and was running at an unusual rate of speed, and that he did not look before attempting to cross the track to see whether a train was approaching, but that he did look in the direction the train came from, to identify a person as an acquaintance, and his line of vision embraced the track for some distance and that he neither saw nor heard the approaching train. *Held*, that the question of negligence was for the jury, and new trial ordered.

On the second trial of the Wheellock case, at April Term, 1871, the jury returned a verdict for defendants.

See also *MORRLAND v. BOSTON & PROVIDENCE R. R. Co.*, 141 Mass. 31; *CAZNEAU v. FITCHBURG, ETC., R. R. Co.*, 161 Mass. 355; *JUNE v. BOSTON & ALBANY R. R. Co.*, 153 Mass. 79, as to persons injured at stations.

Person not Passenger.—In *ALLERTON, Adm'r, v. BOSTON & MAINE R. R.*, 146 Mass. 241 (1888), plaintiff's intestate had alighted from a train and left the defendant's station, and while walking along the highway started to cross the track along the street, when she was struck and killed by an express train. Verdict directed for defendant. Affirmed, the Supreme Court holding that the plaintiff's intestate had ceased to be a passenger before the accident which caused her death.

Licensee.—In *REDIGAN v. BOSTON & MAINE R. R.*, 155 Mass. 44 (1891), it appeared that plaintiff, while walking along defendant's station platform, fell into a hole in the platform and was injured. She was not a passenger but was and had for some time been using the station as a short cut to and from her home. Verdict for defendant, and plaintiff excepted. The Supreme Court held that the trial judge was right in directing verdict for defendant. Plaintiff was a mere licensee and as such assumed the risk of being upon defendant's premises.

PASSENGER INJURED ON STEAMBOAT—FALLING OBJECT—IMPROPER EVIDENCE.—In an action to recover damages for injuries sustained by plaintiff, a passenger on defendants' steamboat, from the falling upon his head of a small boat hung on the larboard side and over the lower deck of the steamboat, through the alleged negligence of defendants in manner of hanging the boat and in not preventing other passengers from getting into it, plaintiff had judgment in the Superior Court and defendants alleged exceptions which were sustained by the Supreme Court on the ground of error in admission of certain evidence. It was held that defendants were bound to the utmost care to guard against injuries to passengers by the falling of the hanging boat. Held also, that whether plaintiff exercised due care in standing under the boat when he saw persons sitting in it was a question for the jury to determine (1).

The court in discussing the exceptions to evidence, said: "The question put by the defendants to one of the witnesses, whether in his judgment the larboard boat was not manifestly to the discernment of passengers of common understanding an inappropriate place for passengers to be in, was rightfully excluded, as asking for an opinion upon a subject which did not require any peculiar skill or experience to judge of, and which, so far as it was material, was to be passed upon by the jury. *Perkins v. Augusta Ins. & Banking Co.*, 10 Gray, 312.

"Evidence that passengers had been in the habit of sitting in the larboard boat so frequently and during such a period of time before the accident that the officers of the steamboat must have known of it, was admissible as tending to show their knowledge of that fact, and therefore competent upon the question whether they took proper precautions to prevent any danger which might reasonably be anticipated from such occupation. It would not, however, necessarily show that they had any reason to suppose that such occupation would be dangerous.

"But evidence of the disregard by passengers of the rules of the steamboat in going outside of the rails in other parts of the vessel, into the starboard boat, or upon the hurricane deck, had no tendency to show a use of the larboard boat by the permission, or with the knowledge of the officers, in a manner dangerous to other passengers. The starboard boat was nearer to the railing and more firmly supported than the larboard boat, and evidence as to the use of the one had no legitimate bearing upon the question of the use of the

1. In *COMMONWEALTH v. COBURN*, 132 Mass. 555 (1882), defendants were found guilty under an indictment, under Gen. St. c. 160, § 34, of negligence in permitting their steamboat to be overcrowded and allowing too many passengers on the hurricane deck, whereby the said

deck was broken and a passenger was thrown into the water and drowned. Defendants' exceptions overruled. *Simmons v. New Bedford, etc., Co.*, 97 Mass. 361 (above reported), cited and approved as to instructions given on the trial.

other. If the case had been left as it originally stood upon the admission of evidence of the use of both boats and the hurricane deck, it might be doubtful whether the incompetent evidence had been so distinctly objected to at the time of its admission as to entitle the defendants to a new trial. But it further appears that, on the subsequent motion of the defendants, the presiding judge refused either to strike out the incompetent evidence, or to instruct the jury to disregard it, or even to instruct them that the fact of passengers having disregarded the rules of the steamer in respect to the starboard boat, the rails or the hurricane deck, had no tendency to show either any license, remission or custom affecting the larboard boat, or any danger of that boat's being improperly used by passengers. This refusal was clearly erroneous, and for this reason the exceptions must be sustained." Opinion by GRAY, J. *Supreme Judicial Court, Massachusetts, October Term, 1867. Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361.

HOLLAND (ADMINISTRATOR) V. LYNN AND BOSTON RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, May, 1887.

[Reported in 144 Mass. 425.]

DEATH OF PERSON INJURED ON STREET CAR—STATUTE—STREET RAILWAY—LIABILITY.—In an action to recover damages for the death of plaintiff's intestate, due to injuries received while riding as a passenger on one of defendant's street cars, judgment for defendant was affirmed, it being held that prior to the Statute of 1886, a street railway company was not liable to an action of tort for the loss of the life of a person, whether a passenger or not a passenger (1).

"TORT, by the administrator of the estate of Julia Holland, for the benefit and use of the next of kin of the said Julia. The declaration was as follows:

"The plaintiff says that the defendant is a common carrier of passengers in the cities of Boston and Chelsea, by means of street railway cars drawn on the defendant's railway by horses; that the plaintiff's intestate, on or about the 31st day of August, 1885, at the request of the defendant, took a seat in one of the cars of the defendant, to be conveyed, for a reasonable sum to the defendant, on said railroad, in said Boston and Chelsea, whereby it became the duty of said defendant to convey the plaintiff's intestate safely on said car.

1. A similar decision was made *GUNN, Adm'r, v. CAMBRIDGE R. R. Co.*, 144 Mass. 430. on the same day and decided by the *Holland case*, above reported, in

Yet the defendant, not regarding its duty in that behalf, wholly neglected so to do, and by its agents and servants so negligently, carelessly and unskillfully managed said car, and the horses which drew the car, in which the plaintiff was seated, and the said railway of the defendant was so unskillfully and imperfectly built by the defendant, and was suffered by the defendant to be in so defective and dangerous a condition, that said car several times ran off the track of said defendant, and was dragged over the pavement of the street, and was so jolted as to cause injury to the plaintiff's intestate, who, during all this time, was in the exercise of due care and diligence on her part; that by reason of said negligence and improper management by said defendant, its agents and servants, the said plaintiff's intestate was severely injured in her body, from which injuries so received by her she died, to her great damage and injury, as the plaintiff says."

The defendant demurred to the declaration, assigning the following cause of demurrer: "Because no action lies in behalf of the plaintiff against the defendant to recover damages for the death of the said Julia Holland."

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

C. T. GALLEGHER and J. F. WHEELER, for plaintiff.

T. P. PROCTOR and E. TAPPAN, for defendant.

Morton, Ch. J. — The question presented in this case is whether, prior to the Statute of 1886, c. 140, a street railway company was liable to an action of tort, if, by reason of its negligence, the life of a passenger was lost. That statute was passed after the injury complained of in this case and therefore has no application to the case. *Kelley v. Boston & Maine R. R.*, 135 Mass. 448.

The public statutes provide that "if by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than five hundred nor more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased." Pub. St. c. 112, § 212. Under this provision a street railway company is liable to an indictment if a life is lost by reason of its negligence, or the gross negligence of its servants.

The same section further provides that "if the corporation is a railroad corporation, it shall also be liable in damages, not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in the case of an indictment."

It is clear that this provision does not apply to street railway companies.

Section 1 of this chapter provides, that, in the construction of this and the following chapter, "the phrase 'street railway' shall mean a railroad or railway usually operated by animal power; 'railroad corporation, and 'railroad company' shall mean the corporation which lays out, constructs, maintains, or operates a railroad operated by steam power; 'street railway company' shall mean a corporation by which a street railway is constructed, maintained or operated."

It is to be observed that the following chapter, which is the chapter concerning street railway companies, makes no provision for an action of tort against such company, if a life is lost by reason of its negligence, or the gross negligence of its servants.

The plaintiff contends that street railway companies are liable to an action of tort under the Pub. St. c. 73, § 6. This provides that "if the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the proprietor or proprietors or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased." This is a re-enactment, in substantially the same words, of the Statute of 1881, c. 199, which was the first statute to give an action of tort for the loss of life against any common carriers of passengers.

It is true that the phrase "common carriers of passengers" is broad enough to include street railway companies; but, when we consider the history and course of legislation upon this subject, we are brought

to the conclusion that this enactment was not intended to include and apply to such companies.

Railroads and other carriers of passengers were first made liable for damages for the loss of life caused by their negligence by the Statute of 1840, c. 80, which provides that, "if the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage coach, or of common carriers of passengers," such proprietors or common carriers shall be liable to a fine, to be recovered by indictment, for the use of the widow and children of the deceased." Under this statute, clearly, railroads were liable to an indictment which could be brought at any time within six years after the injury causing the death. *Comm. v. Boston & Worcester R. R.*, 11 Cush. 512.

By the Statute of 1853, c. 414, railroad corporations were made liable to indictment for the loss of life of persons not passengers, and it was provided that "all indictments against any railroad corporation for loss of life shall be prosecuted within one year from the injury causing the death." These provisions were re-enacted in the General Statutes, as to railroad corporations, in c. 63, §§97, 98, and as to other carriers, in c. 160, §34, which significantly omits railroads from the enumeration of carriers liable under it.

Under the General Statutes it was held that, while indictments against railroad corporations must be brought within one year, indictments against other carriers to whom the statute applied might be brought at any time within six years. *Comm. v. East Boston Ferry Co.*, 13 Allen, 589.

It is thus seen that, after the passage of the general act as to the liability of carriers in 1840, the legislature enacted special statutes applicable to railroad corporations, which were inconsistent with the general act. The legislature could not have intended that railroad corporations should be liable under two inconsistent statutes, covering the same subject. The effect, therefore, of the later special legislation was to repeal so much of the Statutes of 1840 as applied to railroad corporation, or, in other words, to take railroad corporations out of the operation of the earlier statute.

The same reasoning applies in the case of street railway companies.

By the Statute of 1864, c. 229, §§37, 38, street railway companies were made liable to indictment for the loss of life of a passenger, or of a person not a passenger; and it was provided that the indictment, as in the case of a steam railroad company, must be brought within one year of the injury. These provisions were re-enacted in

the Statute of 1871, c. 381, §§49, 50. They were inconsistent with the Statute of 1840, and the effect was to take street railway companies out of the operation of that statute. The Statute of 1874, c. 372, has no bearing upon the case, as it does not repeal the Statute of 1871, above cited, §163, as to the liability for loss of life, being applicable only to railroad corporations operated by steam power, and, as to them, being a re-enactment of laws previously in force.

We come now to the Statute of 1881, c. 199, which first gave an action of tort against carriers of passengers for the loss of life. It is clear that the first section does not apply to street railway companies. But it is useless to discuss this, because the statute was repealed in a few months by the same legislature which enacted it, and the provisions of §1 were embodied in the Public Statutes, c. 112, §212, in a form which, as we have seen in the first part of this opinion, includes only steam railroad corporations.

The third section, re-enacted in the Public Statutes, c. 73, §6, in its description of the parties who are subject to the statute, follows exactly the words of the General Statutes, c. 160, §34, and gives a new remedy against such parties. It was not intended to enlarge the scope of that provision of the General Statutes by making different persons or corporations subject to liability, but to give an additional remedy against the same persons. Being in the same words as the previous statute, it should receive the same construction, unless a different intention is clearly shown. As we have seen, street railway companies, as well as steam railroad corporations, were not within the previous statute. Each had special provisions as to liability for loss of life, and, if the legislature had intended to include them, or either of them, in the third section of the statute, it would have been natural to specify them in the statute.

Our construction is in some degree confirmed by the passage of the Statute of 1886, making street railway companies liable in actions of tort, a statute which was unnecessary if they were already so liable (1).

1. The Statute of 1886, c. 140, is as follows: "If by reason of the negligence or carelessness of a corporation operating a street railway, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of a passenger or of a person, being in the exercise of due diligence, and not a passenger or in the employment

of such corporation, is lost, the corporation shall be liable in damages not exceeding five thousand, nor less than five hundred dollars, to be assessed with reference to the degree of culpability of said corporation or of its servants or agents, and to be recovered in an action of tort commenced within one year from the injury causing the death, by the exec-

For these reasons we are of opinion that, prior to the Statute of 1886, a street railway company was not liable to an action of tort for the loss of the life of a person, whether a passenger or not a passenger.

Judgment affirmed.

NOTE OF MASSACHUSETTS CASES RELATING TO PERSONS INJURED ON STREET CARS.

Riding on Front Platform.—In *MAGUIRE v. MIDDLESEX R. R. Co.*, 115 Mass. 239 (1874), it appeared that plaintiff was riding on the front platform of one of defendant's street cars, and as the car was going down a declivity the driver pulled up short and plaintiff was thrown from the car and his arm was injured. There was a finding for plaintiff and defendant alleged exceptions. The Supreme Court sustained defendant's exception to trial court's refusal to rule out evidence as to driver's carelessness at other times.

In *WILLS, Adm'x, v. LYNN & BOSTON R. R. Co.*, 129 Mass. 351 (1880), it appeared that plaintiff's intestate got on the front platform of defendant's street car, and when the car approached a drawbridge sat down on the platform with his feet on the step. He was told by the driver that he had better not sit in that place as it was unsafe and against the rules of the defendant. There were notices in the car forbidding passengers riding on front platform. Finally the deceased fell from the car and was injured. Held, that plaintiff's intestate was not in the exercise of due care. Judgment on verdict for defendant.

The court distinguished the case from that of *MERSEL v. LYNN & BOSTON R. R. Co.*, 90 Mass. 234 (1864), the plaintiff in that case having paid his fare and being told by the conductor to go on the front platform with the driver and five or six other persons. He was thrown off while the car was turning a corner at unusual speed, and when he was standing up and holding on to an iron railing, and the court properly refused to rule, as matter of law, that he was not in the exercise of due care.

In the *MERSEL* case judgment for plaintiff for \$3,500 was affirmed.

In *O'NEILL v. LYNN & BOSTON R. R. Co.*, 155 Mass. 371 (1892), plaintiff boarded the front platform of a street car and while the same was in motion fell off or was pushed off by the driver. There was a verdict for defendant. Plaintiff excepted to the admission in evidence of a rule of defendant posted in the cars forbidding persons riding on the front platform. Held, that this was properly admitted and that a railway corporation may make all reasonable regulations for the safety and comfort of its passengers.

In *HOLLAND v. WEST END STREET R'Y Co.*, 155 Mass. 387 (1892), plaintiff who boarded the front platform of a street car, while he was intoxicated, fell

utor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or if there are no children, to the use of the widow; or if no widow, to the use of the next of kin.

But no executor or administrator shall for the same cause, avail himself of more than one of the remedies given by this act and § 212 of c. 112 of the Public Statutes."

off the platform and was injured. Held, that a verdict for defendant was properly directed, the evidence showing that plaintiff did not exercise due care, and that his intoxicated condition contributed to the injury.

BRAL v. LOWELL & DRACUT STREET R'y Co., 157 Mass. 444 (1892), was an action for damages for injuries to plaintiff while riding on the front platform of an electric car. There was a verdict for defendant and plaintiff excepted to the charge of the trial court relating to the law of due care required of passengers on electric street cars. Held, that the question whether plaintiff exercised due care was properly left to the jury.

In *WILTON v. MIDDLESEX R. R. Co.*, 125 Mass. 130 (1878), judgment for plaintiff for \$500 was affirmed. It appeared that in July, 1868, plaintiff's daughter, about 13 years of age, by invitation of the driver of one of defendant's street cars, got on the front of the car, and was thrown off or fell off and was injured, by reason of the driver failing to stop. A previous action for the injury to plaintiff's daughter was held not to be a bar to the action by plaintiff for loss of services of his daughter. The previous suit for the injury to the child resulted in judgment for plaintiff for \$5,000. *WILTON v. MIDDLESEX R. R. Co.*, 107 Mass. 108.

Riding on Rear Platform.—In *BRIGHTMAN, Adm'r, v. UNION STREET R'y Co.*, 167 Mass. 113 (1896), it appeared that plaintiff's intestate, aged about eight years, jumped on the steps of the rear platform of one of defendant's horse cars, and subsequently jumped off and received injuries from which he died. Verdict directed for defendant. Exceptions by plaintiff. The Supreme Court held that the fall of the plaintiff's intestate was not due to his being allowed to remain on the steps of the car. It was caused by his voluntarily jumping off when the car was in motion. It was not a part of defendant's duty to prevent a passenger from leaving the car while in motion, still less to prevent a trespasser from doing so. Exceptions overruled.

See also, as to persons riding on platforms of street cars, *GAHAGAN v. BOSTON & LOWELL R. R. Co.*, 1 Allen, 187; *COMM. v. BROCKTON STREET R. R. Co.*, 143 Mass. 501.

Standing on Steps of Open Street Car.—*LAPOINTE v. MIDDLESEX R. R. Co.*, 144 Mass. 18 (1887), was an action for damages for an injury to plaintiff, who, while standing between the seats of a crowded open street car, was thrown from the car as the same was rounding a curve. The trial court refused to rule that plaintiff was not in the exercise of due care under the circumstances. There was a verdict for plaintiff. Defendant excepted, which exception was overruled.

The court cited *MEESEL v. LYNN & BOSTON R. R. Co.*, 8 Allen, 231, and *WILLS v. LYNN & BOSTON R. R. Co.*, 129 Mass. 351, distinguishing the latter case from the *LAPOINTE* case, the *WILLS* case showing that the plaintiff occupied a position on the front platform against the rules of the railroad company, while in the *LAPOINTE* case the conductor called out that there was no room in the car except for people to stand up.

See also *WILDE v. LYNN & BOSTON R. R. Co.*, 163 Mass. 533 (riding on step of car).

Derailment of Street Car.—*FRITAL AND WIFE v. MIDDLESEX R. R. Co.*, 109 Mass. 398 (1872), was an action for damages for injuries sustained by the female plaintiff by reason of the street car, on which she was a passenger,

being thrown off the track. The accident happened on a Sunday, plaintiff having returned from a Spiritualist camp meeting. On the trial defendants requested, among other requests, a ruling that plaintiffs could not recover because they were travelling on Sunday, and had failed to show it was for necessity or charity, which was refused. Verdict and judgment for plaintiffs for \$5,000. On appeal judgment affirmed. The court held that question of Sunday travelling raised in the case was for jury to determine. The legality of defendants' contract with plaintiff did not depend upon validity of defendants' lease of track of another railroad. The fact of a car running off the track is presumptive evidence of negligence, which defendants must rebut by showing that the accident was caused without fault on their part.

Struck by Electric Car.—*CREAMER v. WEST END STREET R'Y CO.*, 156 Mass. 320 (1892), was an action for damages for death of plaintiff's intestate, who was struck and killed by an electric car while crossing track after he had alighted from another car. Held, that the evidence failed to show due care on part of deceased and verdict was rightly directed for defendant.

Injured on Street Car.—In *QUESTED v. NEWBURYPORT & AMESBURY HORSE R. R. CO.*, 127 Mass. 204 (1879), an action for damages for injuries sustained by plaintiff on one of defendant's cars, the declaration contained two counts, the first setting forth that the injury was caused by defendant's servants; and the second that it was caused by the lessee of the railroad, who was operating the same at the time of the injury. On the trial plaintiff was nonsuited on the ground that the injury not being caused by the defendant corporation, the latter was not liable. On exceptions by plaintiff the Supreme Court held that an injured person may have a right of action against either the owner or lessee of a railroad, and that the charter of the defendant corporation rendered it liable. New trial granted.

See also *VALENTINE v. MIDDLESEX R. R. CO.*, 137 Mass. 28 (injured on street car).

TODD V. OLD COLONY AND FALL RIVER RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, October, 1863.

[Reported in 7 Allen, 207.]

PASSENGER'S ARM PROTRUDING FROM CAR WINDOW—CONTRIBUTORY NEGLIGENCE.—In an action to recover damages for injuries sustained by a passenger on a train by the swinging of an unfastened door of another car standing upon a track parallel to that over which he is riding, where it appeared from the passenger's own testimony that his elbow extended through the open window, beyond the place where the sash would have been if the window had been shut, it was held that it was the duty of the court to rule that the passenger's own negligence prevented recovery, and to withdraw the case from the jury.

TORT to recover damages for an injury received by plaintiff while travelling as a passenger in defendants' cars. *Judgment for defendants.*

"At the new trial of this case in this court, before Chapman, J., after the decision reported in 3 Allen, 18, it appeared by plaintiff's own testimony that at the time of receiving the injury his left arm was resting on the base of the window frame of the car, the sash being raised, and that his elbow extended outward, beyond the place where the sash would have been if the window had been shut. Plaintiff was injured by a hasp upon the swinging door of a freight car, which struck plaintiff's arm just below the elbow.

"The judge ruled that the burden was on the plaintiff to prove that he used due care, and that defendants were guilty of negligence; that defendants were bound to use reasonable care adapted to the circumstances of the case; that the means of conveyance employed by them, being instruments of great power and moving with great speed, required an increase of care on their part; and that the same facts required a corresponding increase of care by plaintiff, when he used such means of conveyance; that passengers in railroad cars are bound to occupy the places provided for their convenience and safety by the carriers, and that it is negligence in them to occupy exposed positions which have not been provided or designed for such occupation; and that plaintiff was guilty of negligence in placing his arm in the window, so that his elbow extended outwards beyond the window sash, so as to come in collision with a substance outside the cars; and he directed the jury to find a verdict for defendants, which they accordingly did.

"The plaintiff's counsel contended that there was evidence from plaintiff, and from other sources, as to the mode in which the injury was occasioned, the nature and direction of the wounds, the effect produced by the collision, the motion and oscillation of the cars, the position of the freight car, door, etc., which tended to prove that plaintiff's elbow was inside the sash of the window at the time of the collision, and which should be submitted to the jury; but the judge ruled otherwise. The plaintiff alleged exceptions."

J. J. CLARKE, for plaintiff.

J. G. ABBOTT and H. C. HUTCHINS, for defendants.

Bigelow, Ch. J.—There was no controversy at the trial concerning the position of the plaintiff's arm. His own testimony shows that it was resting on the sill of the window of the car, and that a portion of it, when the injury was inflicted, was beyond the sash, so as to be outside of the external surface of the window. Nor was there any doubt or dispute that if the plaintiff had kept himself entirely within the limits of that part of the car intended for and appropriated

to passengers, the accident which occasioned the injury would not have happened. It was the plaintiff's own act which contributed to the injury. On these admitted facts, the ruling of the court that the plaintiff was not entitled to recover is fully sustained by the previous decision in this case, 3 Allen, 18, 21, and by the several cases there cited. The reasons which influenced our minds in setting aside the former verdict, and which are concisely stated by the learned judge as the ground of his ruling at the last trial, on further consideration approve themselves to our most deliberate judgment.

It is a mistake to suppose that, in directing a verdict for the defendants, the legitimate province of the jury was invaded by the court. Against any such interference we should most scrupulously guard. A wise and impartial administration of justice, as well as the express provision of the statute, (Gen. St. c. 115, sec. 5), require that the decision of controverted questions of fact should be left to the free and unbiased judgment of jurors. But considerations of this nature have no application to cases like the one at bar. Upon the point on which the case was disposed of by the court, there were no facts in dispute, nor did the court undertake to determine whether evidence was true or false. It was solely on the legal effect of admitted facts that the court pronounced its judgment. On this it was not only the province but the imperative duty of the court to determine. *Gavett v. Manchester & Lawrence R. R. Co.*, 16 Gray, 501 (1). *Denny v. Williams*, 5 Allen, 15.

Judgment on the verdict.

1. *GAVETT v. MANCHESTER & LAWRENCE R. R. CO.*, 16 Gray, 501, is reported in 3 Am. Neg. Cas. 742.

MCCELROY AND WIFE V. NASHUA AND LOWELL RAILROAD CORPORATION.

Supreme Judicial Court, Massachusetts, October Term, 1849.

[Reported in 4 Cush. 400.]

CARRIER OF PASSENGERS.—The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all the subsidiary arrangements necessary to the safety of passengers (1).

CARELESS SWITCHING OF TRAIN—PASSENGER INJURED.—A railroad company is responsible for an injury, sustained by a passenger in their cars, in consequence of the careless management of a switch, by which another railroad connects with and enters upon their road, although the switch is provided by the proprietors of the other road, and attended by one of their servants, at their expense.

ACTION on the case to recover damages of defendants, for an injury alleged to have been sustained by the female plaintiff, while riding as a passenger in defendants' cars from Lowell to Nashville. The case was submitted to the court upon an agreed statement of facts. *Judgment for plaintiff.*

The defendants are common carriers, carrying passengers for hire between the above-mentioned places, and the female plaintiff had taken her passage, and paid the fare, from Lowell to Nashville, in the evening train of the defendants.

By section 13 of the act of incorporation granted to the defendants by the legislature of New Hampshire, power was reserved to author-

1. *Derailment of Train—Contract Ticket.*—In *HARTAN v. EASTERN R. CO.*, 114 Mass. 44 (1873), it was held, in an action against defendant for damages for injuries sustained in a derailment of the train on which plaintiff was travelling, that plaintiff, in order to recover against defendant, must base his claim upon some obligation of contract arising from the purchase of his tickets, the tickets, although connected, indicating upon their face a separate service by three different roads. Each ticket bore the name of defendant. The obvious im-

port of such a transaction is that the tickets, for passage upon roads beyond its own line, are sold by the first road as agent for the others. The obligations and responsibilities of a carrier of persons, over other roads than its own, are not thereby assumed, unless its relation to those roads, by contract or otherwise, is such as to confer or at least to consist with, that character. Judgment on verdict for defendant.

See also *HOSMER v. OLD COLONY R. R.*, 156 Mass. 506 (expressman injured in derailment).

ize any other railroad corporation to connect with, enter upon and use the Nashua and Lowell railroad, at a point where the Concord railroad was afterwards made to enter upon the same, and at the point where the alleged injury was incurred. After the incorporation of defendants, the legislature of New Hampshire also incorporated the Concord Railroad Corporation, and granted them the right to connect with and enter upon and use the Nashville and Lowell railroad, at the point where they did enter the same, and where the accident happened.

The Concord Railroad Corporation, in accordance with the powers thus granted, made a switch and connecting track in the defendants' road, so as to pass to and from the same, and entered thereon and placed a switchman there, to let the Concord cars pass on and off the road. This switchman, at the time of the accident, and ever before, was the servant of the Concord Railroad Corporation, and was in no wise the servant of defendants, or in any manner under their authority or control. By an arrangement between the two corporations, defendants hauled the cars of the Concord Railroad Corporation over their road to Lowell, after they had entered thereon, and also hauled them back from Lowell to a point about a fourth of a mile below the junction of the Concord railroad, and there detached them and went on over the switch to the end of their road, leaving the Concord train to follow by force of the momentum previously given to them, but at so slow a speed, as to arrive at the switch after the defendants' train had passed, and then to be switched off by the switchman upon the Concord railroad.

On the evening in question, the Concord train was detached as usual, and the defendants' train, in the rear car of which the female plaintiff was, passed on, and the engine, tender, and forward car passed over the switch in safety, but by the carelessness of the switchman, the switch became changed, so that defendants' baggage car, and the passenger car above mentioned, were turned off upon the Concord railroad, and broken from the forward cars, and thereby and thereon the injury was occasioned for which this action was brought.

The defendants were incorporated by the legislature of New Hampshire, to build that part of their railroad which lies in that State, and by the legislature of this commonwealth, to build that portion of their road which is in this State; and the two corporations were afterwards united by acts of the legislatures of this commonwealth and New Hampshire. The point where the accident happened is in New Hampshire.

The question of damages only was submitted to the jury, and a

verdict taken by consent for the plaintiff upon the facts as above stated, subject to the opinion of the whole court.

J. G. ABBOTT, for plaintiff.

T. WENTWORTH, for defendants.

Shaw, Ch. J.— The court are of opinion, upon the facts agreed, that the defendants are liable to the plaintiffs for the damage sustained by the wife, whilst travelling in their cars. As passenger carriers, the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. The wife having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendants' road, over which they must necessarily carry all their passengers; and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell railroad, and it was within the scope of their duty to see that the switch was rightfully constructed, attended and managed, before they were justified in carrying passengers over it. Had the action been, in form, on the implied contract of the defendants, in undertaking to carry a passenger, to have a safe road, and apply and use all necessary skill, the liability of the defendants might have been more clear and manifest; but the duty is the same, and in most cases of this kind of carelessness, negligence or want of due skill, in the performance of duty undertaken to be done for hire and reward, it is at the election of the plaintiff to declare in *assumpsit*, and rely on the promise, or to declare in tort, and rest on the breach of duty. Whether the plaintiffs might have maintained an action on the case against the Concord Railroad Corporation for the negligence of their servant, or whether the defendants may have a remedy over against the Concord Railroad Corporation, by the terms of the statute under which the latter were allowed to come on to the defendants' road, or by the terms of their contract, we give no opinion. *Waland v. Elkins*, 1 Stark. 272 (1).

Judgment on the verdict for the plaintiffs.

1. In *WEYLAND v. ELKINS*, Holt, 227; *a. c.*, *nom.* *WALAND v. ELKINS*, 1 Stark. 272, it appeared that A and B were partners in the business of public carriers; by contract between them, A found horses and drivers for certain stages, and B supplied them for the remaining stages: Held, that they were, notwithstanding this divi-

sion of the concern between them, responsible for the misconduct and negligence of their drivers and servants throughout the whole distance, and it was no defense to B that the servant by whom an injury was committed, was a special servant of A, and hired and paid by A alone.

HICKEY v. BOSTON AND LOWELL RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, January Term, 1867.

[Reported in 96 Mass. 429.]

STANDING UPON PLATFORM OF MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.—Where a passenger on a railroad train voluntarily stands upon the platform of a car, while the train is in motion, and is injured while on the platform, he cannot recover against the railroad company (1).

"TORT to recover damages for a personal injury sustained by Thomas Hickey, the plaintiff's intestate, while riding upon a passenger car of the defendants.

"At the trial before CHAPMAN, J., there was evidence tending to show that the defendants were in the habit of running a passenger train from Boston to Woburn Centre and back; that they had a smoking car which ran in front of the other passenger cars; that about five hundred feet before coming into the station in Woburn Centre the smoking car was disconnected from the other passenger cars, and the engine and smoking car switched off upon a side track, while the other passenger cars would continue upon the main track until they reached the station; that there was also another side track for freight, between the place of uncoupling the smoking car from the other passenger cars and the station, the switch for which was left unfastened, and when unfastened the rails were liable to be moved from their proper place by the passing of an engine; that on the occasion in question the engine and smoking car ran off upon the wrong track in consequence of the displacement of the rail and switch, and a part of the smoking car was thrown across the main track; and that Thomas Hickey had been riding in the smoking car, and just before it was uncoupled he left it and with other passengers stepped upon the front platform of the passenger car, with the intention of riding in that position into the station. The passenger car was proceeding at the rate of about five miles an hour, and ran against the smoking car while Hickey and others were in that position, and this collision caused an accident by which both of Hickey's legs were broken, and he soon after-

1. See also *BUCHER v. FITCHBURG R. R. Co.*, 131 Mass. 156 (platform of train).

wards died. He went from the smoking car to the platform of the passenger car in order to avoid the inconvenience and delay which would be occasioned by remaining in the smoking car. The evidence tended to show that the collision was caused by the negligence of the defendants in the management of the switch.

"The plaintiff offered to show that it had been the practice of passengers on the train, in the smoking car, to come out of that car just before it was uncoupled, and go upon the platform of the forward passenger car; and, after the smoking car and engine had been uncoupled and switched off, to ride into the station in that position; that this had been the practice for a long time prior to the time of the accident, and that it was so at that time; that this was done with the knowledge and consent and by the permission of the authorized managers of the train, and of the conductor of the same; that the practice was known to the superintendent and directors of the road, and that the conductor and brakeman were on the platform with Hickey at the time of the accident, and did not object to his remaining there.

"The plaintiff's counsel, on inquiry from the court, and in further discussion of the matter, stated that he proposed to show an express permission and consent to such practice or custom by the conductors and brakemen, but only an implied one from the superintendent and directors of the road; that the platform of the passenger car was constructed in the ordinary way and form of such cars; that the plaintiff was accustomed to ride over the said route, and was acquainted with the alleged practice and custom; that if he had remained in the smoking car he would have been switched off on a side track, delayed, and finally only carried to the rear end of the passenger car; that, when uncoupled, the passenger car had only momentum enough to carry it into the station, and could be easily managed by the brakes; that the distance in was so short that there was no time or occasion to go in and take a seat in the passenger car; and that, under the circumstances, the platform was not, as a matter of fact, a dangerous place in which to ride into the depot, under all the existing circumstances of the case.

"The judge ruled that the evidence was not material or admissible, unless it should go so far as to prove that the platform was a place provided by the directors or superintendent for passengers to ride upon; that it is so well known to be a dangerous place for passengers to ride upon, that they occupy it at their own risk; and it is careless to ride there, even though the conductor and brakemen know the fact, and do not say anything about it to the

passengers, or if they consent to it, and though the superintendent and directors know that such is the practice, and do not take action necessary to break it up; that if the jury should find from this non-interference that there was an implied license from the directors or superintendent to the plaintiff to stand on the platform, yet, if nothing more was shown, it was a license to stand there at his own risk, there being no evidence that there were not vacant seats inside the car.

"Upon this ruling the plaintiff did not desire to go to the jury; and the case was reserved for the full court, for a nonsuit to be entered if the ruling was correct."

A. A. RANNEY, for plaintiff.

J. G. ABBOTT (B. DEAN with him), for defendants.

Wells, J.—It is well settled that a party cannot recover for injuries caused by negligence, if he himself failed to exercise proper care, and his own negligence contributed to the result. It is also well settled that the plaintiff must show affirmatively that he was in the exercise of due care upon his own part. *Lane v. Crombie*, 12 Pick. 177; *Carsley v. White*, 21 Pick. 254; *Callahan v. Bean*, 9 Allen, 401. If the injury happen while the party is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care. But when the plaintiff's own evidence shows that he had left the place assigned for passengers, and was occupying an exposed position, and that the injury was due in part to the fact of such position, he must necessarily fail, unless he can also make it appear, upon some ground of necessity or propriety, that his being in that position was consistent with the exercise of proper caution and care on his part. The front platform of a steam railway car, coming into a station, detached from the train, where the approach is complicated by side tracks, turnouts and switches, and rendered more liable to accident by the operation of breaking up and transposing the train while in motion, cannot be otherwise, comparatively, than a position of exposure.

The plaintiff proposed to show that "the platform was not, as a matter of fact, a dangerous place in which to ride into the depot, under all the existing circumstances of the case." But to do that she must exclude from "the existing circumstances of the case" the fact of the accident which threw the forward car across the track, as well as the liability to similar accident which always exists, which cannot be foreseen nor guarded against by the

passenger. The chances of injury are comparatively few, even in the most exposed positions. But a passenger is not justified in incurring risks unnecessarily, however rare the chances may be that he will suffer by it. *Todd v. Old Colony R. R.*, 3 Allen, 18; s. c., 7 Allen, 207 (1). The apparent danger in the case just cited was certainly less than in the one at bar. If, then, the position upon the platform was taken voluntarily, and without reasonable cause of necessity or propriety, the plaintiff fails to show her intestate was in the exercise of due care and caution. An eager desire to be first in, to ride at the front rather than at the rear of the train, is certainly not such reasonable cause. Ordinarily no accident occurs to those who rush out of the train, or rush into the cars at stations, before the train fairly comes to a stop, or after it is in motion again; but it cannot now be questioned that those who do so take upon themselves all the risks which attend such a practice. *Gavett v. Manchester & Lawrence R. R.*, 16 Gray, 501 (2). The excuse for such an attempt was stronger in the case of *Lucas v. New Bedford & Taunton R. R.*, 6 Gray, 64 (3), than it was in the present case.

That the intestate and others were accustomed to take this mode of entering the station did not tend to show that it was safe or prudent for him to do so. Nor would the implied assent of the officers of the corporation, arising from knowledge and acquiescence, nor even the express consent and permission of the conductor of the train, change the relations between the parties and their several obligations. It is not enough for the plaintiff to show that Hickey was rightfully upon the platform. Because he might rightfully occupy whatever place the conductor should permit, it does not follow that he would do so at the risk exclusively of the corporation. If sufficient and suitable provision be made within the cars for all the passengers, the managers of the train are not under obligation to restrict them to their proper places, nor to prevent them from acts of imprudence. If they voluntarily take exposed positions with no occasion therefor, nor inducement thereto, caused by the managers of the road, except a bare license by non-interference, or express permission of the conductor, they take the special risks of that position upon themselves. *Sweeny v. Old Colony & Newport R. R.*, 10 Allen, 368. The court are of opinion, therefore, that the plaintiff's testimony failed to furnish any evidence of

1. Reported in this volume, page 448, *ante*. 3 Am. Neg. Cas. 742.

2. *GAVETT v. MANCHESTER & L. R. R.*, 16 Gray, 501, is reported in 3. *LUCAS v. NEW BEDFORD & TAUNTON R. R.*, 6 Gray, 64, is reported in 3 Am. Neg. Cas. 735.

proper care on the part of her intestate; and that the rulings at the trial were right.

A nonsuit must accordingly be entered.

BARDEN v. BOSTON, CLINTON AND FITCH-BURG RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, January, 1877.

[Reported in 121 Mass. 426.]

NOT CONTRIBUTORY NEGLIGENCE TO STAND IN CAR OF TRAIN APPROACHING STATION.—Where a passenger, after the announcement of his station, leaves his seat and stands inside the closed door of a car that has been switched from the rest of the train to a track upon which is another train waiting for the car to be attached, and the car collides with the train so violently that the passenger is thrown down and injured, the company is liable.

“**TORT** for personal injuries received by the plaintiff while a passenger in a car of the defendant. Trial in the Superior Court, before Allen, J., who, by consent of the parties, before verdict, reported the case for the determination of this court, in substance as follows:

“The plaintiff purchased of the defendant a ticket at Attleborough for Taunton, and entered the defendant's train for that city. A short distance before arriving at the station in Taunton, in the daytime, the engine and one passenger car containing passengers for Taunton were switched off on a side track, leaving the car, in which the plaintiff was, to run down the main track and connect with the train from Boston for New Bedford, which was waiting on the track in the station for the train from Attleborough.

“The car containing the plaintiff was so carelessly and negligently run into the station as to come in violent collision with the other train standing in the station, and with such force as to throw the plaintiff upon and against the seats and the floor of the car, breaking three of his ribs, inflicting a severe wound on his head, and injuring his left shoulder and arm.

“The plaintiff was occupying the seat next the closet on the right side of the car, at the rear end, and, when the approach of the car to the station at Taunton was announced, he arose from his seat and stood in the aisle, preparatory to leaving it when the car should stop, and, while so standing, the collision took place. He stood at the time three or four feet from the door, which was shut, and had not been opened or touched by him.

"The defendant contended that the evidence tended to establish the foregoing facts, and that, if so, the plaintiff was guilty of contributory negligence, as a matter of law, which would preclude his recovery. The plaintiff contended that it was a question for the jury.

"If the plaintiff on these facts was guilty of such negligence, as matter of law, as to preclude a recovery, judgment was to be entered for the defendant; but if, on the other hand, the plaintiff, as matter of law, was not guilty of contributory negligence, or if that question was for the jury upon the foregoing facts, then judgment was to be entered for the plaintiff in the sum of \$8,000 and costs."

J. DAGGETT & E. H. BENNETT, for plaintiff.

G. A. TORREY, for defendant.

Gray, Ch. J.—We can have no doubt that the contract between the parties, which required the corporation to furnish the plaintiff with a seat, did not, as matter of law, oblige him to keep it from the time he first took it until the train had come to a final stop at the place of his destination; and that the question whether he was wanting in reasonable care in leaving his seat and standing in the passageway inside the closed door, after the approach of the train to the station at which he was to alight had been announced and the car had actually entered the station, and for the purpose of hastening his departure from the car, was a question of fact for the jury.

In the cases on which the defendant mainly relies, the plaintiff was not, as in this case, wholly within the car. *Hickey v. Boston & Lowell R. R.*, 14 Allen, 429 (1); *Todd v. Old Colony R. R.*, 3 Allen, 18, and 7 Allen, 207 (2); *Pittsburg & Connellsville R. R. v. McClurg*, 56 Pa. St. 294 (3).

Judgment for the plaintiff.

STEWART V. BOSTON AND PROVIDENCE RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, May, 1888.

[Reported in 146 Mass. 605.]

PASSING BETWEEN CARS OF MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.—Where plaintiff boarded a wrong train and

1. Reported in this volume, page 448, *ante*.
454, *ante*.

2. Reported in this volume, page

3. Reported with the *Pennsylvania* cases in 10 Am. Neg. Cas.

in going from one car to another of a rapidly moving train, was injured by coming in collision with a passenger crossing the platforms between the cars and being thrown from the platform, the trial court rightly directed a verdict for defendant, there not being evidence to show any negligence of defendant (1).

"TORT for personal injuries sustained by the plaintiff by being thrown from a car of the defendant. Trial in the Superior Court, before Pitman, J., who ordered a verdict for the defendant, and reported the case for the determination of this court, in substance as follows:

"The plaintiff testified that he lived on the line of the defendant's railroad, and that on the afternoon of December 15, 1885, instead of taking a train that stopped at his station, as he intended, he entered another train by mistake; that after the train had started, the conductor, on looking at his ticket, told him that the train was an express train that did not stop at his station; that the conductor then said to him, 'You will have to ride as far as Canton Junction, take the two rear cars and come back at half-past eight'; that he 'immediately got up to take the two rear cars'; that while on his way, as he was passing from one car to another, he met a woman coming toward him; that he had just time to turn on his heel to let her pass, 'when the train gave a lurch to the left, threw me off my balance, and I instinctively threw out my left hand to grasp the railing between the two cars, and this lady was thrown against me, and the next thing I knew I found myself lying on the track and that I had been hurt'; and that there was no gate on the platform of the car.

"If the plaintiff was entitled to go to the jury on the above facts, then the verdict was to be set aside, and a new trial granted; otherwise, judgment was to be entered on the verdict."

G. A. PERKINS, for plaintiff.

G. PUTNAM and T. RUSSELL, for defendant.

Morton, Ch. J.—The plaintiff took the wrong train through his own fault. After the train had started, the conductor discovered

1. In *DEWIRE v. BOSTON & MAINE R. R.*, 148 Mass. 343 (1889), plaintiff was passing through a crowded train as it was in motion, and while standing upon the front platform of a car looking through the door or window in search of a seat, an engine under control of one of defendant's firemen was run out on a spur track and struck the car on

which plaintiff was standing, partially overturning it, and in trying to prevent falling under the wheels plaintiff was injured. Verdict on trial for plaintiff. Exceptions by defendant were overruled by the Supreme Court. [*Stewart v. Boston & Providence R. R.*, 146 Mass. 605, cited and distinguished.]

this, and informed the plaintiff that he could not stop at the point to which he wished to go, but that, by taking one of the two rear cars, he could get off at a station beyond, and return to his destination at a later hour. This was not a command or direction by the conductor that the plaintiff should go from the car he was in to the rear car, which justified him in doing so at the risk of the defendant. In going from one car to another of a rapidly moving train, merely for his own convenience the plaintiff took upon himself the risk of all accidents not arising from any negligence of the defendant. While crossing over one of the platforms between the cars, the plaintiff came in collision with another passenger crossing the platform in an opposite direction, "the train gave a lurch to the left," and he was thrown from the platform. There is nothing to show that the lurch was extraordinary, or anything more than a usual and inevitable incident of a swiftly moving train. The evidence fails to show any negligence of the defendant which caused the accident, and the Superior Court therefore rightly directed a verdict for the defendant. Judgment on the verdict.

WHITE V. BOSTON AND ALBANY RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, May, 1887.

[Reported in 144 Mass. 404.]

CHILD INJURED ON TRAIN—FALLING OBJECT.—Where plaintiff, a child about four years of age, was injured by the fall of a portion of one of the porcelain shades of a lamp fixed in the upper part of one of defendant's cars, on which plaintiff was a passenger, the question whether the accident was caused by the insufficiency of the fixture, was for the jury to determine from the evidence.

"**TORT** for personal injuries sustained by the plaintiff by the fall of a portion of one of the porcelain shades of a lamp fixed in the upper part of a car of the defendant, in which the plaintiff was a passenger, alleged to have been caused by the defendant's negligence.

"Trial in the Superior Court, before Knowlton, J., who allowed a bill of exceptions, in substance as follows:

"The whole of the evidence touching the question of the defendant's negligence was as follows: The plaintiff was a passenger on the train, and was a minor, about four years of age. The lady who accompanied and had charge of her testified that they took the train leaving Boston in the afternoon, on April 9, 1885, to go to Faneuil;

that the lamps in the cars were not lighted; that before reaching Columbus Avenue station, which is the first station out of Boston, and two or three minutes' ride in the cars from it, she heard a crash over her head, and, an instant afterwards, several pieces of the porcelain shade fell from the upper part of the car into her lap; and that one struck the plaintiff on the face, and inflicted the injuries complained of. Another witness testified that she saw a piece of the shade falling, and saw it strike the child; that it came from the porcelain shade of a lamp directly overhead, and in the top of the car, which was a fixture in the car. A third witness testified that she saw pieces of the shade on the floor of the car, and saw the conductor take down the remaining portion of the porcelain shade, which he did by standing with his feet on the two opposite seats and reaching up to the lamp fixture in the top of the car. It appeared that, just after the accident, the conductor took the names of several witnesses to the accident.

"The defendant rested its case, and upon this evidence requested the judge to rule that the plaintiff could not recover. The judge refused so to rule; and ruled that, upon the evidence, the question of the defendant's negligence was a question of fact for the jury.

"The jury returned a verdict for the plaintiff in the sum of \$5,000 and the defendant alleged exceptions."

SAMUEL HOAR, for defendant.

W. GASTON and C. L. B. WHITNEY, for plaintiff.

W. Allen, J.—If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant would be for the jury; and the fact that it broke and fell from the use for which it was intended would be evidence that it was defective and unsafe, and, if not explained or controlled, would be sufficient evidence to authorize the jury to find that the defendant was negligent in regard to it. The fact that the act of the defendant, in placing and using the fixture in the car, caused the injury, would be evidence that it was caused by the negligence of the defendant.

The contention of the defendant is, that there was not sufficient evidence of that fact; and that it did not appear that the accident was not caused by the act of a stranger, or by some external force for which the defendant was not responsible.

We think that the question was for the jury, and that they were authorized to infer from the situation of the fixture, from the absence of evidence of any other cause of the accident, and the probability

that there would have been such evidence had such cause existed, and from all the attending circumstances in evidence, that the accident must have been caused by the insufficiency of the fixture. It was not necessary that the evidence should show that it was impossible that there should be any other cause; it was sufficient if it satisfied the jury that there was none. *Ware v. Gay*, 11 Pick. 106 (1). *Feital v. Middlesex R. R.*, 109 Mass. 398 (2); *Kendall v. Boston*, 118 Mass. 234; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312 (3).

Exceptions overruled.

NOTE OF MASSACHUSETTS CASES RELATING TO PERSONS INJURED ON TRAINS.

Train Falling Through Bridge.—In *COMM. v. VERMONT & MASSACHUSETTS R. R. Co.*, 108 Mass. 7 (1871), it appeared that a vender of popped corn, etc., was under agreement as to passage upon defendants' trains in return for certain privileges and rentals. On June 16, 1870, he lost his life by being precipitated through a bridge with a train of defendants' cars, due to a collision between the train and a hand car driven by persons in the employ of defendants. An indictment on the Gen. St. c. 63, § 97, to recover a fine for the use of the widow and children of the deceased, resulted in a verdict against defendants. Exceptions by defendants, which were overruled, the court holding that the deceased was a passenger, that the question of negligence of defendants' employees was properly submitted to the jury, and that the conditions upon deceased's ticket did not have the effect of relieving defendants from liability, under a penal statute, for gross negligence and carelessness.

Children Killed—Travelling on Pass.—*LITTLEJOHN, Adm'r, v. FITCHBURG R. R. Co.*, 148 Mass. 478 (1889), was an action for damages for death of two children of plaintiff, aged respectively one and three years. Plaintiff and his wife were riding on a free pass, and the children were with them. The accident was caused by defective track. There were two actions, both being tried together. Verdict in each case for plaintiff for \$2,500. Defendant excepted. The Supreme Court held that defendant's request for ruling that "the defendant is not responsible for the defective condition of the road, unless the defendant had notice of the same, or might have had notice by the exercise of due care," should have been given. Exception sustained.

Passenger Found on Track.—In *BRADY, Adm'r, v. OLD COLONY R. R. Co.*, 162 Mass. 408 (1894), action for damages for alleged negligent killing of plaintiff's intestate by defendant, the deceased, who was a passenger on one of defendant's trains, having been found on defendant's track, *ALLEN, J.*, in the course of his opinion said: "it would seem from the bill of exceptions that at the Montello station the engine stopped at the water standard, which would leave the cars alongside of the station platform; and it is stated that

1. See note of this case on page 426, *ante*.

2. See note of this case on page 447, *ante*.

3. *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, is reported in 3 Am. Neg. Cas., 760.

all the passengers left the train. The train stopped about two minutes, and then went on to the north for a short distance in order to be switched back upon another track, Monicello being the end of its route. Nobody appears to have seen the plaintiff's intestate leave the car, and, so far as is disclosed, the next that was seen of him was that shortly afterwards a switchman saw him lying beside the track about thirty-five or forty feet north of the north end of the platform; and some one who was not a witness was then assisting him to his feet. He was much injured, and died about six hours later. The circumstances of his receiving the injury were not more particularly disclosed, and perhaps could not be. The negligence now relied on is, that the passenger during this journey was obviously sick, and that the defendant ought therefore to have looked after him, to have helped him out of the car, and to have seen that he reached a place of safety, and that it failed to do so. This argument could be urged with force before the tribunal having to pass upon the question of negligence. We cannot know exactly how the facts appeared to the mind of the judge, or say, as matter of law, that his finding was wrong." Judgment for defendant affirmed.

For other actions as to persons injured on trains, see *WHITE v. FITCHBURG R. R. Co.*, 136 Mass. 321 (falling object); *CODY v. NEW YORK & NEW ENGLAND R. R. Co.*, 151 Mass. 462 (jumping to avoid collision); *POWERS v. BOSTON & MAINE R. R. Co.*, 153 Mass. 188 (freight train collision).

CROSS v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

Supreme Court, Michigan, April Term, 1888.

[Reported in 69 Mich. 363.]

FALLING INTO HOLE ON STATION GROUNDS.—Where plaintiff, a passenger on defendant's train, was injured by falling into a hole while leaving defendant's grounds at midnight, the route taken being that usually travelled by people coming from or going to the depot, the situation of the hole, its proximity to the travelled path, and whether plaintiff was negligent in falling into it, were facts for the jury and judgment for plaintiff affirmed (1).

ERROR to Washtenaw. The facts are stated in the opinion. *Judgment affirmed.*

WEAVER & WEAVER (GEORGE C. GREENE and OSCAR G. GETZEN-DANNER, of counsel), for appellant.

SAWYER & KNOWLTON, for plaintiff.

1. *Among other actions in Michigan relating to Persons Injured at or Near Stations, etc., are the following:*

MALMSTEN v. MARQUETTE, HOUGH-

TON & ONTONAGON R. R. Co., 49 Mich. 94 (1882), action for damages for death of plaintiff's intestate, who was killed by being struck by a train of freight cars at the steamboat wharf

Morse, J. — The plaintiff sues for injuries received by a fall into a hole upon the station grounds of the defendant at Pittsford, Michigan.

On the second day of October, 1885, the plaintiff, a passenger on defendant's train, reached Pittsford in the night. It was dark and rainy. He lived at Chelsea. Went to Pittsford that day, and took passage on defendant's road to Hillsdale. When he returned to Pittsford there were no lights about the grounds outside of the depot. A Mrs. Cole was with him. They left the depot to go to her residence. To reach the main street of the village, they had to travel east from the depot. On his way, and while on the grounds of the company, he fell into a hole about two feet and eight inches deep, permanently injuring his ankle. The accident happened about midnight. Mrs. Cole fell into the same hole.

The station house of the defendant is about thirty rods west of the main portion of the village. The railroad runs nearly east and west, bearing somewhat to the north as it goes to the west. The principal streets of the village are State and Market, crossing each other at right angles some ten or fifteen rods to the north of the railroad. Market street, running east and west, extends to the station grounds.

A few feet to the west is the culvert, at the end of which is the hole into which the plaintiff fell. The railroad track or right of way intersects the south line of Market street, cutting it off, and reducing its width to about thirty-six feet at its extreme west end. The station building is on the north side of the railroad track, and the distance from the passenger depot to the west end of Market street is about 235 feet. From the west end of this street there is a wagon

or pier of defendant, having landed from a steamboat. Judgment for plaintiff affirmed.

In **LEWIS v. FLINT & PERE MARQUETTE R'Y Co.**, 54 Mich. 55 (1884), plaintiff having alighted from a train at a flag station was injured by falling into a cattle guard at night while walking along the track to reach the highway. It appeared that plaintiff had been carried past his station. It was shown that he had a knowledge of the whereabouts of the cattle guard. The Circuit Court held that plaintiff had no right of action for

the injury. The Supreme Court affirmed that ruling holding that the injury was the result of an accident for which the railroad company was not liable.

COLLINS v. TOLEDO, ANN ARBOR & NORTH MICHIGAN R'Y Co., 80 Mich. 390 (1890), was an action for damages for injuries sustained by plaintiff by the fall of a plank on which she was walking in ascending the platform at defendant's depot. Plaintiff recovered \$1,000 damages which, on appeal by defendant, was affirmed by the Supreme Court.

way, running westerly along the north side of the railway, north of the station building, and still on west to a north and south highway or village street; this route, by the consent of the defendant company, being used by the people of the village and the surrounding country as a public highway past the station, as well as a means of ingress and egress to and from the depot. There are no other means of direct access to the depot by wagons, from the west. Along the east end of the depot is a platform over which passengers go to and from the cars. Near the north end of this platform is a gravel and timber walk, extending easterly in a direct line to the south side of the west end of Market street. This walk has been there some fifteen years, and was constructed of timbers five by ten inches set up edgewise, and filled in between solid with gravel, making a walk somewhat elevated above the ground on either side. This walk was built by the railway company, and kept up by it, for the use of footmen coming to and going from the depot. On the north side of Market street there is, and has been for some years, a plank sidewalk extending from State street to the railway grounds. This was used by many people passing to and from the depot.

It is claimed by the defendant that there was a gravel walk on the south side of Market street, commencing at the termination of the timber and gravel walk of the defendant, and running easterly to State street; but this is denied by the plaintiff. The evidence fails to disclose any considerable travel along the south side of Market street. The testimony shows that the bulk of the foot travel, for many years, to the depot, from the east, came along the plank sidewalk on the north side of Market street, and then diagonally across the wagon road and the culvert to a point on defendant's timber walk, near two trees, and then on the timber walk to the depot; that the same route was used in going from the depot, not only by the public generally, but by the station agent and other employees of the railroad.

It is claimed by the defendant that at the west end of Market street the railroad company had for many years maintained a walk, running nearly north and south, connecting the plank walk on the north side of Market street with the east end of the timber and gravel walk of the defendant. This is denied by the plaintiff. The evidence of the witnesses in his behalf tended to show that at the time of the accident, and for a long time prior thereto, this walk, if it ever existed, had been sunken out of sight, and gone out of use; also that the timber and gravel walk of the defendant, terminating at the south side of the west end of Market street, from such terminus

west to the two trees, was never used by passengers to any great extent, and at the time of the injury to plaintiff had gone to decay, and was not safe, by reason of holes in it, in the night time, and had not been used for some time.

The testimony of plaintiff's witnesses also tended to show that between this diagonal path and the west end of Market street, and north of the east end of the timber and gravel walk, there was, in wet weather, a mud hole, which, at the time of the accident, extended so far to the north as to crowd the diagonal path nearer the culvert hole than usual, the travel then being within two feet of it. This hole was not barricaded or otherwise guarded, nor was its presence indicated by any light or other signal.

The main controversy turns upon the right of passengers coming to or leaving defendant's train to use this diagonal path or travelled way. It was insisted upon the trial below, and it is also argued here, that the railroad company had provided a convenient and reasonably safe means of egress from its cars and station by the way of the timber and gravel walk, and the cross-walk from that to the plank walk on the north side of Market street; that by so doing the company had fulfilled its whole duty to the public and to its passengers, and, if the plaintiff was injured in an attempt to reach the village by some other route, he can have no remedy against the defendant.

In accordance with this theory, the defendant's counsel requested the circuit judge to charge that—

"If the plaintiff left the gravel walk, and went diagonally across toward the plank walk, and in so doing fell into this excavation, he cannot recover;"—

And in other requests asked instructions of similar import. The court refused to so charge the jury, but instructed them, in substance, that if the defendant had, without objection, notice, or protest, permitted its passengers to cross its depot grounds on this diagonal line or walk, then it was its duty to keep its grounds along and near such walk or way in reasonably safe condition for the coming and going of its passengers, by guards, fences and lights, so as to enable such passengers to avoid any hole or other obstruction by, on, or in which such passengers might be injured; and if the fact of the permission of such use was found, as aforesaid, it made no difference that there was another and safer way by which the plaintiff might have passed out.

That if this diagonal way had been a public and common way, to the knowledge of the defendant, for any considerable length of time,

so that it became one of the ways, recognized by the company and its agents, to go to and from its depot, then it was its duty to keep it reasonably safe to go and come upon, the same as it would a route which it had actually provided;—

“And the simple fact that they had provided another way by which every passenger could have gone, and some did go, is not a question at issue in this case.”

I find no conflict in the evidence as to the following facts:

1. The hole into which plaintiff fell was upon the station grounds of the defendant.
2. It was left entirely unguarded, by night or by day.
3. The diagonal way was travelled by nearly all the people coming from or going to the depot.
4. No objection was ever made by the railroad company, or any of its agents, to its use. The employees of the defendant used it, and it was recognized as the most common way of all, and was by usage and implied permission, at least, one of the regular ways to and from the depot.

The jury were undoubtedly correct in the finding of facts, and the court was right in his theory of the law.

This diagonal walk being a recognized way to and from the depot, it was the duty of the defendant to keep it reasonably safe. 1 Ror. R. R. 476; Smith, Neg. (2d ed.) 126, 188; Cooley, Torts, 605; Delaney v. Railway Co., 33 Wis. 67; Hulbert v. R. R. Co., 40 N. Y. 145; Dillaye v. R. R. Co., 56 Barb. 30; Gaynor v. Railway Co., 100 Mass. 208; Tobin v. R. R. Co., 59 Me. 183; Hoffman v. R. R. Co., 75 N. Y. 605; Cartwright v. Railway Co., 52 Mich. 606, 18 N. W. Rep. 380 (1).

The hole in question was near enough this diagonal walk, if the testimony upon the part of the plaintiff was accepted by the jury, that a person travelling the same might, by making a false step, or by stumbling from the path, fall into it. In such case the defendant would be liable for the injury, if proper care was exercised by the plaintiff. Hardcastle v. Railway Co., 4 Hurl. & N. 67; Barnes v. Ward, 9 C. B. 392; Hadley v. Taylor, 1 L. R. C. P. 53; Cooley, Torts, 660; Wood, Nuis., sec. 271; 1 Add. Torts, sec. 245; Pickard v. Smith, 10 C. B. (N. S.) 470; Bishop v. Trustees, 1 El. & El. 697; Wilkinson v. Fairrie, 32 Law J. Exch. 73; Binks v. Railway Co., 32 Law J. Q. B. 26; Hounsell v. Smyth, 29 Law J. C. P. 203; Wettor v.

1. Reported under their respective States in this and next volume.

Dunk, 4 Fost. & F. 298; *Indermaur v. Dames*, 1 L. R. C. P. 274 (1).

The situation of this hole, its proximity to the travelled path, and whether the plaintiff was negligent in falling into it, were questions of fact for the jury, and were properly submitted to them.

The court did not err in instructing the jury that it was a question of fact for them to determine, if they found this diagonal way a common one, and the defendant permitted passengers to use it, whether or not the defendant should have kept some guide, guard, or light, or some way by which a man would be kept out of it. It was for the jury to locate this hole in its relation to the pathway; and if they found it so near the way that a man, in the "ordinary aberrations of travel," might fall into it, then, as a matter of law, it should have been guarded.

The defendant cannot complain, because, under all the evidence, this hole was upon the station grounds of the company, and near

1. The facts in the several English cases cited in the case at bar are as follows:

In *Hardcastle v. South Yorkshire Railway and River Dun Co.*, 4 H. & N. 67, it was held that when an owner of land makes upon it an excavation adjoining a public way, so that a person walking upon it might, by making a false step, or being affected with a sudden giddiness, or by the sudden starting of a horse, be thrown into the excavation, the party making the excavation is liable for the consequences; but it is otherwise when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the land of the party making the excavation before he reached it. Held also, that the proper and true test of legal liability in such case is, whether the excavation is substantially adjoining the way.

In *BARNES v. WARD*, 9 C. B. 392, it was held that a person who excavates a hole in his own ground abutting on an immemorial public highway, so that the use of such way be rendered unsafe to the public, even when using

ordinary care, is responsible for an injury to a person accidentally falling into such hole while passing with ordinary caution along the highway. Held also, that the fact of the person, so falling into the hole, being thereby a trespasser, is no answer to an action by him for the injury which he has sustained. Held also, that though the liability arises from the defendant being in possession of the hole, the declaration may describe it by alleging the defendant to be in possession of a messuage, with the appurtenances, part of which appurtenances is the hole.

In *HADLEY v. TAYLOR*, 1 L. R. C. P. 53, where the defendants were the temporary occupiers of a warehouse, and within fourteen inches of a highway was an unfenced hoist hole, part of the premises, into which a party, in passing along the highway accidentally fell, and was injured; it was held that the defendants were liable for the injury.

In *PICKARD v. SMITH*, 10 C. B. N. S. 470, it appeared that refreshment rooms and a coal cellar at a railway station were let by the company to S., the opening for putting the coals

enough to be dangerous to persons travelling the diagonal way at night. The court could have safely told the jury that, if they found this way recognized and permitted by the railroad company, it was negligence in the defendant leaving it in the condition it was.

There was no error in the admission of evidence. The testimony of the civil engineer (Davis) that this hole was a dangerous place, and needed protection, comes squarely within the rule settled in this State in the case of *Laughlin v. Railway Co.*, 62 Mich. 220, 28 N. W. Rep. 873.

Mrs. Cole, who was injured at the same time by falling into this same hole, was not called by the plaintiff as a witness in his behalf, and she did not testify upon the trial. The defendant's counsel requested the court to charge the jury—

"That the failure of the plaintiff to call Mrs. Cole—the unexplained failure—is a matter that the jury may take into considera-

into the cellar being on the arrival platform. A train coming in while the servants of a coal merchant were shooting coals into the cellar for S., a passenger, whilst passing in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded. Held, that S., the occupier of the refreshment rooms and cellar, was responsible for this negligence.

In *BISHOP v. BEDFORD CHARITY* (Trustees), 1 El. & El. 697, the facts were: The defendants, being the owners of a house and premises, demised the same on April 1, 1853, to M. for thirty years, at a rent payable quarterly, with a right of re-entry if the rent should at any time be in arrear more than fifteen days. M. occupied the first floor for some time, and let out the rest of the house to separate weekly lodgers, each of whom had a right to draw water from the tank in the area, and to use the area for the purpose of doing so. In March, M. let the first floor to T., a weekly lodger, and then ceased to re-

side in the house, never paying the quarterly rent due at Lady-day, 1858, or at Midsummer, and both were in arrear at the time the action was brought. T. had the same privilege of using the area and tank as the other lodgers. In July, M. became insolvent, and about the 25th of that month he gave up the lease to the official assignee, and was discharged upon the 30th. In the same month, the defendants gave notice to the lodgers that the rent must be paid to them, and two of the lodgers did so pay the rent. On August 4, the plaintiff suffered an injury by falling through a grating in an area belonging to the house, and being part of the premises so let with the house. A few days after the accident to the plaintiff, viz., on or about the 7th of August, T., who was the tenant of the first floor, received a notice from the inspector of nuisances to repair the grating in front of the house; this notice was immediately handed by him to the defendants, and they repaired the grating. In November, the defendants called upon the assignees to elect whether they would

tion as to whether or not her testimony would have hurt plaintiff if he had called her."

The court refused to so charge, and said:

"It would be, in my opinion, equally forcible if the other side should ask me to charge that, because the defendant failed to bring Mrs. Cole here, her evidence would have been against them, and she would swear as Cross has. The presumption is as much one way as the other."

We think the court was correct in his refusal, and right as to the presumption. If she was within reach of the process of the court, either party had, as far as the record shows, equal facilities for bringing her into court as a witness; and the mere fact that either failed to do so raised no presumption that she would testify against their particular theory of the accident. But there was nothing to show that she was accessible as a witness. The counsel for the

take the lease or not, and upon their refusal to take it, the defendants took possession of it, and of the house and premises. It was admitted that the injury to the plaintiff was occasioned by the negligence of some person or persons in not keeping the grating in repair. Held, that there was no evidence that the defendants, before the time of the accident, had avoided the lease and entered into possession of the premises, and had thus become answerable for the negligence by which the plaintiff was injured.

In *WILKINSON v. FAIRRIE*, 1 H. & C. 633, 32 L. J. Exch. 73, a carman was sent by his employer to the defendants' premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase, and was seriously injured. Held, that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase.

In *BINKS v. SOUTH YORKSHIRE*

R'Y AND RIVER DUN CO., 32 L. J. Q. B. 26, it appeared that a company was possessed of a canal and the land between it and a sluice, an ancient public footpath passed through the land close to the sluice, there was a towing-path, nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the foot path. By permission of the company the intervening space had been recently used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way, and fell into the canal and was drowned. Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the company the duty of fencing the canal off; and that the other facts did not render the company liable for the accident.

In *HOUNSELL v. SMYTH (SMITH)*, 7 C. B. N. S. 731, 29 L. J. C. P. 303, it appeared that the owners of some waste

defendant had the right to make such proper comments upon her absence as the facts warranted, but he had no right to call upon the court to instruct the jury that her absence militated against the plaintiff, or that they might guess that she was not called by him because her version of the transaction would have hurt his case.

Neither do we think that the story told by the court had any tendency to injure the defendant. The propriety of it may well be doubted, but we are not prepared to hold that its recital or application was harmful error.

The case, under the conceded facts, seems to be a plain one, and we have no doubt that the finding of the jury was correct, and the case fairly tried and correctly submitted, under the law, by the court.

The judgment is therefore affirmed with costs.

DERAILMENT OF TRAIN—DEFECTIVE WHEEL.—In an action brought by Mrs. Huntley for personal injuries suffered on November 5, 1874, by reason of an accident caused by a passenger car being thrown from the track and upset, the Supreme Court said that "the testimony showed that the mischief was caused by the

land, which was bounded by two highways, had opened in it a quarry which was worked by their licensees, and the plaintiff, not knowing of the quarry, passed over the waste in the dark to get from one road to the other, and fell into the quarry. Held, that no duty was cast upon the owners to fence, as the digging the quarry did not amount to a public nuisance.

In *WETTOR v. DUNK*, 4 F. & F. 298, it was held that if an excavation has been made so near to a highway since its dedication and adoption, as to create or increase danger to the public, and an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so.

In *INDERMAUR v. DAMES*, 1 H. & R. 243, 1 L. R. C. P. 274, affirmed on appeal; 2 L. R. C. P. 311, it was held that it is the duty of the occu-

pier of a building, with reference to persons resorting thereto in the course of business upon his invitation, express or implied, to exercise reasonable care to prevent damage happening to them from unusual danger in the construction of the premises, of which he has or ought to have knowledge. Any duty on the part of the occupier of a building to provide for the safety of a master workman employed to do work is equally owing to the servant workman whom he may lawfully send in his place. The defendant was the occupier of a sugar refinery, in which was a shaft necessary for his business, but open and unfenced. Certain gas fittings were being put up which it was desired to test. The plaintiff was sent by his employer, the gas fitter, to the refinery for that purpose; while so engaged, the plaintiff fell down the shaft. Held, that the defendant was liable for the injuries.

breaking of an axle containing a large flaw, within the wheel or near its edge. Those witnesses who made any actual examination found the flaw entirely within the axle, and covered by a small thickness of sound metal. The suit was tried in April, 1877, about two years and a half after the accident. Mrs. Huntley was injured in the shoulder, and claimed that the same was permanent. Testimony was introduced bearing upon the condition of the cars and track, and the speed of the train, as well as concerning the character of the injury. The principal questions arise upon the medical testimony and upon the charge; although some other points are presented." The court in discussing the points held that more than ordinary speed is not necessarily evidence of negligence in running a train. Evidence of defects of track at other times and places than those of the accident cannot be given to prove negligence contributing to the injury. Actual negligence must be proved; it cannot be implied or presumed. A physician cannot testify to his opinion as to what ails a patient where it is not the result of his own examination nor based on facts in proof. Evidence of exclamations of pain made at a medical examination after the controversy arose for the purpose of obtaining testimony, and not for treatment, properly excluded. Judgment for plaintiff reversed. Opinion by CAMPBELL, CH. J. *Supreme Court, Michigan, April Term, 1878. Grand Rapids and Indiana R. R. Co. v. Huntley*, 88 Mich. 537.

ARCHER v. THE FORT WAYNE AND ELMWOOD RAILWAY COMPANY.

Supreme Court, Michigan, June Term, 1891.

[Reported in 87 Mich. 101.]

RIDING ON FRONT PLATFORM OF STREET CAR, NOT NEGLIGENCE.—Where, by reason of the crowded condition of a street car and of the rear platform, a passenger is obliged to ride on the front platform, and there are no regulations to the contrary, he is not guilty of negligence in so doing; and it is a question of fact for the jury to determine whether or not such manner of riding is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent passengers from being thrown from the car.

NEGLIGENCE—JURY.—The question of the negligence of a passenger while so riding, and of the defendant, should be submitted to the jury under proper instructions (1).

1. *Among other cases in Michigan relating to Persons Injured on Platforms of Cars, are the following:*

In *DOWNNEY v. HENDRIE*, 46 Mich. 498 (1891), plaintiff while seated at

the driving bar on one of defendant's street cars, there being room inside the car, fell off the car and was injured owing to alleged sudden jerk of car. Verdict ordered for defend-

ERROR to Wayne. The facts are stated in the opinion. *Judgment reversed.*

S. E. ENGLE, for appellant.

EDWIN F. CONELY and ORLA B. TAYLOR, for defendant.

Champlin, Ch. J. — On the 25th day of December, 1888, between eight and nine o'clock in the evening, the plaintiff took passage upon one of the defendant's cars, but, on account of the number of passengers in the car and upon the rear platform, was compelled to stand upon the front platform of the car, from which he was thrown, and received very severe injuries by his leg being run over and crushed by one of the car wheels. The court took the case from the jury and directed a verdict for the defendant.

The declaration in the case alleges the duty of the defendant company, which plaintiff claims it violated, as follows:

1. To provide and furnish said plaintiff a safe and convenient seat or place to ride while being so conveyed as such passenger.
2. To provide prudent, safe, and competent agents to manage said car, and provide for his safety as such passenger.
3. Not to drive said car at such a rate of speed as to be dangerous to said passengers, and to the plaintiff as a passenger.
4. To have a chain or guard across the passageway down the

ant. On appeal judgment was affirmed, it being held that plaintiff was guilty of contributory negligence in sitting on the driving bar, even at the driver's invitation, when there was room for him inside the car. Held also, that there was no evidence of negligence in running over plaintiff after he fell from the car, the driver having stopped the car as soon as he could.

In **DICKINSON v. PORT HURON & N. W. R'y Co.**, 53 Mich. 43 (1884), it appeared that plaintiff, a passenger, was selling excursion tickets on a train of defendant, and while passing along the side step of a car, was struck by a coal bin on a parallel track, the bin standing within two inches of the step upon which plaintiff was standing. Verdict and judgment for plaintiff, which on appeal was affirmed, the court holding that

the facts presented a case for the jury.

In **WORMSDORF v. DETROIT CITY R'y Co.**, 75 Mich. 472 (1889), the plaintiff was injured in a collision of street cars due to alleged negligent management of the cars and defective appliances. Judgment for plaintiff was reversed, the trial court erroneously charging that there were four grounds of recovery, that they might all stand or fall separately, and that if the jury found that the accident was caused by either of the grounds stated, although failing on the other three grounds, plaintiff was entitled to recover.

See also **EAST SAGINAW, etc., STREET R'y Co. v. BOHN**, 27 Mich. 508; **UPHAM v. CITY R'y Co.**, 85 Mich. 12, and **ETSON v. FORT WAYNE, etc., R'y Co.**, 110 Mich. 494, for injuries to persons on platforms of cars.

steps at the end of the front platform extending across the passageway, for the safety of passengers.

5. To slacken the speed of the car and to stop when called upon to do so by the plaintiff at the time he slipped and fell from the car, while he was hanging to the guard rail of the car.

The neglect of duty alleged by the plaintiff in his declaration is as follows :

1. That the defendant wrongfully, negligently, and carelessly then and there furnished and provided imprudent and incompetent agents, to wit, the driver and conductor then in charge of the car.

2. That the defendant wrongfully and negligently failed to provide a safe and suitable seat or place for the plaintiff in and upon such car as such passenger, and negligently and carelessly allowed the car to be so filled and crowded as to prevent the plaintiff from passing inside the car, which in the exercise of due care he endeavored to do, and thereby wrongfully compelled him to stand and ride upon the front platform of said car.

3. That while he was so lawfully standing and riding, and in the exercise of due care on his part, the defendant wrongfully and negligently had no chain or guard across the passageway down the steps at the end of the front platform on the right hand of the car so moving eastward, but wrongfully and negligently allowed said chain or guard to be hanging there, not in use, and not hooked up as a guard and protection across the steps in its usual place where it was customary to keep the same.

4. That the driver and conductor wrongfully, recklessly, and carelessly mismanaged said car, and were then and there going at a high rate of speed, when the driver wrongfully and carelessly, without any notice or warning to the plaintiff, struck the horses a blow with his whip, causing them to jump forward, giving the car a sudden jerk and a pitching, rocking motion, and still further increasing its speed to a high and dangerous rate, just as it was passing the cross-walk on Riopelle street, thereby then and there throwing the plaintiff from the platform at the right hand thereof, causing him to slip from the step, and to swing around to his right towards the car, while trying to save himself by clinging with his right hand to the hand-rail of the car, the swift motion of the car dragging him backwards, while struggling to recover himself, and while calling, as he then did, to the driver to stop or slacken the speed of the car, and causing him to fall upon his back with his leg across the rail of the track, so that the car wheel ran over it, and crushed the ankle joint

and bones of the leg below the knee, and cut, crushed, and bruised the flesh of his leg.

The declaration, having set out the duty of the defendant, and its neglect to observe such duty, then states that, "by reason of the wrongful and negligent acts of the defendant aforesaid, the plaintiff was seriously hurt," etc.; and concludes, "whereby, and by reason of the premises aforesaid, the plaintiff hath sustained damages," etc.

The testimony introduced upon the trial showed that the plaintiff and his father took passage upon the car on the night stated, and that the car was filled inside, and the rear platform also, and that they were obliged to take passage upon the front platform; and that while riding in that place, with his back against the car and holding onto the guard rail at the right with his right hand, the driver struck the horses with his whip, which caused the car to swerve to the left; and, as he was standing on the right hand of the door of the car, his back was thrown against the end of the car, and he went to pitch forward to try to recover his footing, slipped down the step, striking his hip against it, and, hanging to the guard rail, his back was turned towards the horses. He tried to regain his footing, and did regain it, and tried to get back on the car, but slipped off the lower step, and was swung around, and, still hanging by his right hand, was dragged along the ground, and his foot was caught under the wheel of the car, and run over. He called to the driver to stop, and he testifies that the driver "appeared to be having all he could do to attend to his horses. They were kind of unmanageable, and he did not see me, or did not stop the car until I was run over." He testifies that he thought he shouted loud enough for him to hear, but he did not make any attempt to stop the car. The word he used when he called out was "Stop!" as loud as he could. He testifies that the driver did not go over ten or fifteen feet after the car ran over him until it was stopped.

The plaintiff's father was also sworn as a witness on behalf of the plaintiff, and testified that he was also riding upon the front platform on the left of the door; that the road appeared to be very rough; that the car swayed and swerved a great deal, with a kind of rocking motion, and that he held onto the dashboard with both hands; that the driver struck the horses a blow with the whip, which caused them to start suddenly. He also testified that the driver was driving with loose lines, and did not make any effort to stop when his son called out, "until he went quite a little past; that he told the driver to stop, that the boy had fallen off; that the driver went only a short

distance, he did not think he went over half a car, from the time he got hurt, but from the time he fell off he must have gone three or four rods anyway." He also testified that there was no guard across the steps on either side of the platform. The plaintiff testified as to the speed at which they were going as follows:

"They seemed to be going quite rapidly. I have seen them drive fully as fast plenty of times, and a good deal slower. They seemed to have a good rate of speed; that is, at the time I fell off."

Testimony was also introduced tending to show that the driver was behind time, and was endeavoring to make it up.

The plaintiff introduced in evidence sections 4 and 5 of chapter 107 of the Revised Ordinances of 1890, as follows:

"Sec. 4. Every street railway company in the city of Detroit shall so inclose and guard the front platform of each car operated and run by any such company within the limits of the city as to prevent passengers from getting on or off such platform. (Approved July 14, 1873.)

"Sec. 5. No conductor or driver of any street railway car, while such car is in use, shall permit any person to enter or leave the same by way of the front or forward platform; and no person, when the forward platform of any street railway car in actual use is inclosed or guarded, as required in the preceding section, shall enter or leave, or attempt to enter or leave, such car by the forward platform thereof; and no person under the age of sixteen years shall ride on the rear platform of any street railway car, or get on or off the same while said car is in motion. (Approved May 4, 1876.)"

There was no testimony introduced upon the trial which tended to show that the car upon which the plaintiff was riding had a chain or any other device for preventing persons from entering or leaving by way of the forward platform, or to protect them while riding thereon.

The only testimony bearing upon the question of the negligence of the company or its agents, namely the conductor and driver, in the management of the car, was the testimony showing that the car was filled with passengers inside, and the rear platform was also filled, so that the plaintiff could not obtain passage inside the car, and was thereby compelled, if he rode upon that car, to take passage upon the front platform. This he had a right to do, and it was not negligence on his part so to occupy the front platform under the circumstances. *Upham v. Railway Co.*, 85 Mich. 12. It does not appear from the plaintiff's own testimony that the car was driven at

an unusual rate of speed, and it does appear that the accident happened upon a straight track, and that there was nothing calling upon the defendant and its agent to give any special warning that he was about to use his whip upon his horses. The plaintiff was in position where he could observe the movements of the driver, and was as well qualified to see and know when the whip was used as if he had been warned by the voice of the driver that he was about to strike his horses. The position he occupied upon the car was one fraught with danger, and called upon him to use diligence commensurate to the dangerous position he occupied. It is true that the railway company owed to him, while riding in that place, increased care not to so conduct and manage its cars by its neglect to cause him injury, and it is a question of fact which ought to be submitted to a jury to determine whether or not the position of riding upon the front platform of a street car is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent them from being thrown from the car.

It was said in the case above referred to that it was difficult to see upon what reason the courts can hold that platforms of cars are dangerous, and that persons who ride there assume all the risk, and thereby relieve such companies from all liability, except for gross, willful, and wanton misconduct; and, under the facts of that case, it was said that the question of the negligence of the plaintiff, as well as of the defendant, belonged to the jury to determine, and should have been submitted to them under proper instructions. We think this case comes within the ruling above referred to, and should have been submitted to the jury.

The judgment will be reversed, and a new trial ordered.

ELDRIDGE V. MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY.

Supreme Court, Minnesota, June, 1884.

[Reported in 32 Minn. 253.]

DERAILMENT OF TRAIN—PRESUMPTION OF NEGLIGENCE.

—To rebut the presumption of negligence in a railroad company, arising from an accident by which the plaintiff was injured, the defendant offered evidence of the circumstances of the accident, the character and actual condition of the cars, roadbed, and track, and of the speed and management of the train, and also evidence of expert witnesses, tending to show that the track and cars were well built and in good condition, and that the train was properly managed. *Held*, to make a case for the

jury upon the question whether defendant exercised due diligence under the circumstances.

NEW TRIAL—PRACTICE.—The granting of a motion for a new trial for newly-discovered evidence is largely in the discretion of the trial court; and where such discretion appears to have been fairly exercised in determining such motion, its action in the premises will not be reversed.

ACTION brought in the District Court for Waseca county, to recover damages for personal injuries received by plaintiff while a passenger in a car of defendant which was derailed. At the trial before **BUCKHAM, J.**, and a jury, the defendant had a verdict. Plaintiff moved for a new trial upon the following grounds, viz.: 1, newly discovered evidence, 2, that the verdict is not justified by the evidence, and 3, error in law occurring at the trial, and appeals from an order denying his motion. *Order affirmed.*

LEWIS & LESLIE, for appellant.

COLLESTER BROS., for respondent.

Vanderburgh, J.—It must be admitted that the burden of proof rested upon the defendant in this case to show that the accident by which plaintiff was injured, on the train upon which he was a passenger, was not caused by any want of care or foresight on defendant's part. Such exonerating evidence would naturally embrace, as defendant insists it did in this case, the circumstances of the accident, the management of the train, and also the condition of the cars, roadbed and track, at the particular place.

Whether or not, in this case, there was sufficient evidence to support the finding of the jury in defendant's favor, is the principal question on this appeal. The charge in the complaint is that, while plaintiff was such passenger, the defendant so negligently conducted in the operation of its road and the management of the train, that the car in which plaintiff was riding was derailed and thrown with great force from the track while the train was running at a high rate of speed, by reason of which he was seriously injured, etc. The testimony of defendant's witnesses tended to show that the roadbed, track, and cars were in good order and repair; that the ties, rails, and fastenings were sound and strong, and of good materials; that the second car from the engine was the first to leave the track, and caused the derailment of the other cars; that at the point where it so left the track the rails remained well fastened and in their place after the accident, and that, upon an examination made by the conductor and engineer, who were competent to speak from experience, it did not appear that the accident was caused by any breakage or defect

in anything connected with the cars or track. The evidence also shows that the engine was in charge of a skillful and competent engineer; that the train was being managed in the usual way, and was being run at the usual rate of speed, twenty-five miles an hour, which was considerably less than that of the express trains on the same road; and that the accident occurred just after the engineer had slackened the train for a crossing, as was customary, by the application of the air brakes, under circumstances which seem to have afforded no reasonable ground for apprehending it. The conductor testified that trains are often thrown from the track from causes that are not discoverable upon the most careful examination. But, if this car "jumped" the track in consequence of "slackening," or "taking up the slack," in the train at the particular place in the road, it was a fact for the consideration of the jury, as, also, whether the happening of the accident from such a cause was consistent with the most careful practical management of the train. *Howard v. St. Paul, M. & M. R'y Co.*, 32 Minn. 214. We think the circumstances of the accident and of the management of the train were sufficiently shown to the jury to entitle them to judge whether the train was managed with due care and skill, under the rule of liability applicable to a carrier in such cases, and we must presume that this rule was correctly given to the jury, though the charge of the court is not made part of the record.

Stress is laid upon the fact that the evidence fails to disclose the real cause of the accident; and it is insisted by the plaintiff that it devolves upon the defendant, in order to exonerate itself from the charge of negligence, and to show that it exercised the highest degree of care consistent with the practical operation of the road, to disclose specifically to the jury the real cause of the accident, and thus make it appear that it was exempt from responsibility. This question relates rather, as we think, to the method of proof by which the result is to be reached. The evidence, as spread upon the record, may seem stronger or weaker according to the circumstances of each case. Yet where it reasonably tends to establish the absence of such responsibility and liability on the part of the carrier, upon all the points in issue, it must be left to the jury to weigh, and their verdict exonerating the defendant, if fairly reached, must be presumed to include a finding of the real cause of the accident, or, if inexplicable, that the defendant was nevertheless exempt from negligence or culpability. *Brehm v. Great Western R'y Co.*, 34 Barb. 256, 271.

The conductor testified that certain other railroads, with which he was familiar, were "first-class roads," and that he considered this was also a "first-class" road; but as he was particularly interrogated as respects the condition and construction of this road, what he said in reference to other roads, which was received under objection, though immaterial, was harmless. The plaintiff had testified that the train, after proceeding for a while at the rate of twenty-five miles an hour, started up faster, and at the time of the accident was running at a much higher rate of speed. It was therefore competent for defendant, in rebuttal, to prove the actual speed of the train, and that it was not running faster than the usual rate of speed, which was twenty-five miles an hour. Plaintiff's objection to this evidence was therefore rightly overruled. That the engineer slackened the train at the crossing, and that it was usual to do so, tended to explain to the jury the facts as to the management of the train at the time, and that there was no irregularity in it, and was properly in rebuttal of plaintiff's testimony on the subject.

As to the newly-discovered evidence, it doubtless appeared to the trial court that if the ties and track were actually in the condition sworn to by the witness Brown, reasonable diligence on the part of the plaintiff would have enabled him to have discovered witnesses to prove such facts upon the proper inquiry; and, in view of the strong counter-affidavits introduced on the motion by defendant, we are unable to see that there was any abuse of discretion by the trial court in refusing a new trial on this ground. *Peterson v. Faust*, 30 Minn. 22.

Order affirmed.

DAHLBERG V. MINNEAPOLIS STREET RAILWAY COMPANY.

Supreme Court, Minnesota, November, 1884.

[Reported in 32 Minn. 404.]

CARRIER OF PASSENGERS—OBSTACLES ON STREET CAR TRACKS.—A street railway company, as a carrier of passengers, is bound to exercise the highest care in the management of its cars in approaching and passing structures and obstacles in the street situated unreasonably close to the track.

PASSENGER.—The position which a passenger in a street car may reasonably be allowed to assume, when taking or occupying a seat, is subject to no arbitrary rule. He is to exercise a degree of care commensurate with the position.
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surate with the danger to which he may be exposed, and such as men of common prudence would exercise in a like situation, having regard to all the circumstances, and considering the probability that the carrier will exercise due care; but the degree of care to be exercised in any particular case is usually a question of fact for the jury.

HAND ON OPEN WINDOW OF STREET CAR.—Where a passenger in a street car, while in the act of taking his seat, rested his hand on and partially over the base of an open window, and the same was immediately struck and injured by upright sewer planks standing in close proximity to the passing car. *Held*, that the question of contributory negligence on his part was for the jury.

APPEAL by defendant from an order of the District Court for Hennepin county, Koon, J., presiding, refusing a new trial, after a verdict of \$1,300 for plaintiff. *Affirmed*.

WILSON & LAWRENCE, for appellant.

MERRICK & MERRICK, for respondent.

Vanderburgh, J.— This action is for damages for injuries received by plaintiff while a passenger upon one of the defendant's street cars, in the city of Minneapolis. The accident occurred from the contact of plaintiff's hand, which was partly outside the open car window, with upright planks placed by the city near the track while in the construction of a sewer across the street and under the track. The evidence is conflicting as to the degree of proximity of the sewer planks to the body of the passing car, but we think there was evidence in plaintiff's behalf, for the jury, tending to show that the car ran very close and within less than an inch of them. These planks were erected each side of the sewer, about three feet apart, and were for the purpose of preventing the earth from caving in during the progress of the work. The plaintiff states in his testimony that he entered the car, proceeded to the front to pay his fare, got change in an envelope, and went back and sat down, and says: "I put my hand like this on the window (illustrating by putting his hand on the arm of a chair, with the fingers on the outside), I was hardly sitting down before I was struck by the planks." He also testifies that his hand was caught and turned around by the first plank and his arm broken by the second plank, and that his hand was first struck on the knuckles. "The car was going pretty fast—trotting." On cross-examination, he said: "I walked back from the front of the car to the second window; I had the envelope in my fingers and put it out; I did not throw it out; I put my hand out just far enough to let the envelope out; I was partly sitting down before I was struck with the first plank; my hand was caught just

as I sat down." The sewer planks had just been put up, and the driver of the car had not previously passed them. He had sole control and management of the car, and, according to plaintiff's evidence, he did not stop or slacken its speed on approaching the sewer. It does not appear that plaintiff had any notice of the obstruction.

1. The defendant, as a carrier of passengers, was bound to exercise extraordinary care, and liable for slight neglect, and the question of negligence in the management of the car on approaching an obstacle which might graze or come in such close proximity to the car as to be dangerous, would naturally be for the jury, and we think it was properly submitted to them in this case; for, independently of contributory negligence on the part of a passenger, he might, by a jolt of the car or for other justifiable reason, temporarily expose a hand or limb beyond the limits of the car, and be injured. *Dickinson v. Port Huron & N. W. R. Co.*, 18 N. W. Rep. (Mich.) 553 (1).

2. The principal question in the case is presented by the defendant's exceptions to the rulings of the court upon the question of the plaintiff's alleged contributory negligence in temporarily extending his hand or fingers over the edge of the window sill. The court charged the jury that "as a general proposition of law, if a man should thrust his hand outside of a car window carelessly and negligently, so as to come in contact with an object which was at a reasonably safe distance from the car, and should be injured, and he would not have been injured but for that negligent act on his own part, he could not recover at all." But if the plaintiff simply put his hand upon the window sill as he sat down, and as described in plaintiff's testimony, the windows being open, though his fingers were beyond and outside of the window, "if the accident occurred in that way, and that was all he did," it was not, in the opinion of the court, negligence in law. The court further instructed the jury that he was bound to do what a person of ordinary prudence would do, and nothing more, and "he is liable for contributory negligence if he did in this instance what a person of full age and discretion, and ordinary intelligence, care, and prudence, should not have done." The court, therefore, left the question to the jury, and refused to charge the jury, as requested by defendant's counsel, that if the jury believed that the plaintiff's arm or hand was outside the window when the injury occurred, he could not recover.

We are not prepared to say, assuming plaintiff's version of the case to be true, that the court erred in holding that, if the conduct

1. See note of this case on page 474, *ante*.

of plaintiff was negligent, it was an inference to be drawn by the jury and not by the court. By this the court did not imply that plaintiff's conduct was not negligent, but that it was not necessarily or conclusively such. A very careful or thoughtful person would be likely to refrain from such an act, while it is not so clear that, in the judgment of a majority of ordinarily prudent men, the conduct of the plaintiff, as testified to by him, would, in itself, be careless or unauthorized. A passenger is to be allowed a reasonable measure of liberty in the position assumed by him in taking or occupying his seat. He is expected to exercise care commensurate with the danger to which he may be exposed; but the degree of care to be exercised on a particular occasion is generally a question of fact for the jury. *Stackus v. N. Y. C. & H. R. Co.*, 79 N. Y. 464. Thus, whether the act of standing on the platform of a street car, or of getting on or off such car while in motion, is negligence, is held usually to be for the jury under the circumstances of each case. *Whart. Neg.*, §§365, 370; *Meesel v. Lynn & B. R. Co.*, 8 Allen, 234 (1); *Eppendorf v. Brooklyn City & N. R. Co.*, 69 N. Y. 195 (2); *Shear. & Redf. Neg.*, §282. So, in *Germantown P. R'y Co. v. Brophy*, 17 Rep. (Pa.) 538 (3), it was held not negligence *per se* for a passenger to rest his arm on a window sill, "which is substantially the top of the back of the seat," whence, by a jolt of the car, his arm was thrown out of the window and injured; the court saying: "In the absence of collision with an external object his arm was in no danger of injury. He was under no legal obligation to assume or anticipate that the company would run another car against the one in which he was sitting." But if, instead of resting his arm on the window sill, he had taken hold of it as did the plaintiff, his hand extending, say, less than an inch beyond the car, the same suggestion might be made (notwithstanding the additional fact) in considering the question of negligence. *Whart. Neg.*, §362; *Hutch. Carr.*, §659; *Thomp. Carr.*, 258; *Fordham v. London, etc., R'y Co.*, L. R. 3 C. P. 368 (4); *Ang. Carr.*, §559, note; *Seigel v. Eisen*, 41 Cal. 108; *Miller*

1. There is a note of this case on page 446, *ante*.

2. *Eppendorf v. Brooklyn City, etc., R. Co.*, 69 N. Y. 195, is reported in 5 Am. Neg. Cas. 219.

3. Reported with the *Pennsylvania* cases in vol. 10, Am. Neg. Cas.

4. In *Fordham v. London, Brighton & South Coast R'y Co.*, 4 L. R. C. P. 619, affirming 3 L. R.

C. P. 368, the facts were: A passenger, in getting into a railway carriage at a station, placed his left hand on the back of the open door to aid him in mounting the step. There was conflicting evidence as to whether a proper handle was affixed to the carriage, to the right hand of the door, but the night was dark, and the passenger did not see any handle. He

v. St. Louis R. Co., 5 Mo. App. 471 (1); *Spencer v. Mil. & P. R. Co.*, 17 Wis. 487 (2). That is to say, whether the position or conduct of the passenger in such cases is reasonably prudent, considering the circumstances and the probability that the carrier will exercise due care, is not necessarily a question for the court (though in clear cases it of course would be), but may be and ordinarily is for the jury.

It must also be considered that in order to the successful operation of cars there must be a reasonable space, on each side, between them and any structures or obstacles in the street, to accommodate their movements caused by irregularities or impediments on the track; and that as respects danger from collision with such structures, it is ordinarily easily averted in the case of street cars, which run at a moderate rate of speed, and are readily controlled. *Lyman v. Union R'y Co.*, 114 Mass. 83; *Thomp. Carr.*, 258, 446. The question of the passenger's negligent conduct must be largely affected by the circumstances of each case, including any indications of danger from obstructions, or interruptions, from whatever cause, which might influence the conduct of a prudent person. But in *Todd v. Old Colony & F. R. Co.*, 3 Allen, 18; s. c. 7 Allen, 207 (3), it was unqualifiedly ruled that voluntarily suffering an arm or any part of it by a passenger to extend beyond the external surface of a car was negligence *per se*. And in *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294 (4), it is assumed by the court that such conduct by a passenger is wholly unauthorized and presumptively negligent. These cases growing out of accidents arising upon steam railways have been followed by the courts of several States. The same rule was also applied in *Lauderbach v. People's R. Co.*, Pa. Sup. Ct. 1884,—a street car case. The hand of a passenger holding on to the window of a car was caught by a colliding car on a narrow street, where the cars necessarily grazed in passing. No reference is there made to any supposed distinction between the case of street

had a parcel in his right hand, and before he had completely entered the carriage, the guard, without any previous warning, closed the door, and crushed his hand between the back of the door and the door post. Held, that there was evidence of negligence on the part of the company's servant, and no evidence of such contributory negligence on the part of

the passenger as to entitle the company to a nonsuit.

1. Reported with the *Missouri* cases in this volume, *post*.

2. Reported with the *Wisconsin* cases in vol. 10, Am. Neg. Cas.

3. Reported in this volume, page 448, *ante*.

4. Reported with the *Pennsylvania* cases in vol. 10, Am. Neg. Cas.

and steam railroad cars. The court assumes that the protruding hand or arm is in an unlawful place if in any degree outside of the car by the voluntary act of the party, thus cutting off discussion as to whether, in the absence of any regulations on the subject, such conduct in a passenger would be condemned as careless by men of ordinary prudence. The opposite doctrine is maintained, as to street cars, in *Miller v. St. Louis R. Co.*, *supra*; *Seigel v. Eisen*, *supra*. We do not undertake to speak as to the application of the rule to other than street railways, but, confining ourselves closely to the facts of this case as presumptively found in plaintiff's favor by the jury, we are of the opinion that the case was properly submitted to them.

3. It appeared that the plaintiff was a laboring man, and had been laid up for some weeks and unable to do anything. These facts were proper for the jury to consider, in respect to the extent and character of the injury, in their general estimate of damages. No claim for special damages was made in that behalf.

Order affirmed.

MATZ v. ST. PAUL CITY RAILWAY COMPANY.

Supreme Court, Minnesota, January, 1893.

[Reported in 52 Minn. 159.]

FALLING OFF REAR PLATFORM OF STREET CAR—NEGLIGENCE FOR JURY.—In an action to recover damages for the death of plaintiff's intestate due to falling off the rear platform of one of defendant's horse cars the question of negligence of the parties should have been submitted to the jury and order directing new trial, on motion of plaintiff, affirmed (1).

APPEAL by defendant from an order of the District Court of Ramsey County, KERR, J., made February 4, 1892, granting plaintiff a new trial.

1. In *BLONDEL v. ST. PAUL CITY R'y Co.* (Minn. 1896), 68 N. W. Rep. 1079, plaintiff, while on one of defendant's electric cars, left his seat to speak to the conductor, and as the car was rounding a curve he was thrown against the side of the car and injured. Held, not guilty of contributory negligence and judgment for plaintiff for \$200 affirmed.

In *SAIKO v. ST. PAUL CITY R'y*

Co. (Minn. 1896), 69 N. W. Rep. 473, plaintiff while standing on the step of one of defendant's street cars preparatory to alighting therefrom, the car going at the rate of seven miles an hour, was thrown off and injured. Verdict was rendered for him but, on appeal by defendant, was reversed, the court holding that plaintiff was negligent.

"On July 15, 1890, William Matz was riding as a passenger on one of defendant's street cars. He was standing on the rear platform of a horse car on the Lafayette and Greenbriar Line in St. Paul, and fell over the guard rail on the dasher of the rear platform and fractured his skull as he struck the ground. He died of the injury. The plaintiff, Anna Matz, was on October 30, 1890, appointed by the Probate Court of Ramsey county administratrix of his estate. She next day brought this action to recover \$10,000 damages, claiming his death was caused by the negligence of defendant in not supplying the car with a guard rail on the rear dasher, of sufficient height to prevent his falling over it while riding there.

"At the close of plaintiff's evidence the court, on defendant's motion, dismissed the action on the ground that there was not sufficient proof of negligence to sustain a verdict for plaintiff. She moved for a new trial for error in not submitting the question of negligence to the jury. The court granted the motion and ordered a new trial. Defendant appeals. *Order affirmed.*

HENRY J. HORN, for appellant.

J. L. MACDONALD, for respondent.

Mitchell, J. — This was an action to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant. The only question on this appeal is whether the evidence made a case for the jury. It reasonably tended to prove the following facts: The car on which deceased was riding was one of the horse cars formerly used on the Payne avenue line. The rear platform extended the whole width of the car body—about six feet—and was about three and a half feet wide. It had a dasher across the end, and a shifting gate on the side next the other track, for the purpose of keeping passengers from going out on that side. The other side of the platform was left open for the ingress and egress of passengers. The dasher had a rail along the top, and on the rear end of the car body was a hand rail on each side of the door. The rail on the dasher was about two and a half feet high, and the gate on the side was "a little bit lower." The dashers and gates on the cars on some of defendant's other lines were from six to eight inches higher. Inside the car were the usual straps for passengers who had to stand. The track on that line was quite rough, had "high and low joints," so that a car "would go uneven when it passes over them." The cars would rock a good deal. It was the practice and custom of the defendant to carry passengers on the platforms, and

at certain hours they would be crowded. When the deceased got on the car the seats were all occupied, but there was still standing room inside. He did not attempt to enter the car, but took his stand on the platform, near or "against the gate, but not sitting on it." He did not take hold of anything with his hands. While standing there he fell "backwards" or "sideways" over the gate, striking the ground on the top of his head, and fracturing his skull, so that he shortly afterwards died. The car was in motion when he fell, but there is no evidence as to its rate of speed, except that one witness testified that "it was moving steadily." None of the witnesses testify as to whether or not there was any jerk or rocking of the car at the time he fell, but he evidently lost his balance in some way, and we think the facts in evidence would have justified the jury in concluding that it was caused by the motion of the car.

The contention of the defendant is that this evidence was insufficient to sustain plaintiff's case, because: First, it did not tend to prove any negligence on its part; and, second, it affirmatively showed that the deceased was guilty of contributory negligence in not either going inside the car, or, at least, if he preferred to remain on the platform, in not taking hold of the hand rail or the rail on the dasher. The contention of the plaintiff is that the defendant, when it permitted and invited passengers to ride on the platform, was guilty of negligence in not providing a dasher and gate of sufficient height to prevent passengers from falling over; and that the question whether the deceased was guilty of negligence in standing in the manner he did on the platform was a question for the jury. We are quite clear that the question of defendant's negligence was one for the jury. Permitting and inviting, as it did, passengers to ride on the platform, it was its duty to use all reasonable precautions to insure their safety. Under the circumstances disclosed by the evidence it was to be anticipated that passengers might, by reason of the jolting or rocking of the cars, or of some other cause, lose their balance, especially when the platform was crowded; and it was a fair question for the jury to say whether, in the exercise of that high degree of care required of carriers of passengers, the defendant ought not to have guarded the platform with rails or gates of sufficient height to have prevented just such accidents as occurred in this instance. The evidence as to decedent's contributory negligence was also a question for the jury. Standing on the rear platform of a street car in motion, even when there is room inside, is not, under ordinary circumstances, conclusive evidence of negligence, at least in the absence of any published rule prohibiting it,

and especially where, as in this case, the carrier impliedly invited it. Neither did the omission of the deceased to take hold of the rail of itself amount *per se* to negligence. Nor, in view of common experience and common practice, can it be said as a matter of law that the two facts combined constituted negligence. *Fleck v. Union Ry. Co.*, 134 Mass. 480; *Upham v. Detroit City Ry. Co.*, 85 Mich. 12 (48 N. W. Rep. 199); *Nolan v. Brooklyn City & N. R. Co.*, 87 N. Y. 63.

With reference to another trial, we may add that whether, under the circumstances, the dasher and gate were of a safe and proper height for the protection of passengers, was not a proper subject for expert testimony. That was the very question which the jury had to pass upon, and they were just as competent to pass upon it, in the light of all the evidence, as any so-called "expert."

Order affirmed.

AMONG OTHER ACTIONS IN MINNESOTA RELATING TO PERSONS INJURED ON TRAINS AND STREET CARS, ARE THE FOLLOWING :

Travelling on Free Pass.—In *JACOBUS v. ST. PAUL & CHICAGO RY CO.*, 20 Minn. 125 (1873), plaintiff brought action to recover damages for personal injury sustained while travelling as a passenger upon defendant's railroad, occasioned, as alleged, by the negligence of defendant. The defenses were, that the plaintiff was travelling upon a free pass or ticket, issued to him without consideration, by accepting which he assumed all risks of accident; that contrary to the regulations of the defendant, well known to plaintiff, he was riding in a baggage car, when the accident occurred; that plaintiff's own negligence contributed to the injury, without any negligence of defendant. The cause was tried in the Court of Common Pleas for Ramsey county, resulting in a verdict for plaintiff. Defendant moved to set aside the verdict, and for a new trial, upon the grounds, that the verdict was not justified by the evidence, and was contrary to law, and for errors of law occurring at the trial. Motion being denied, defendant appealed to the Supreme Court. The court, in discussing the case, said: "Notwithstanding the fault or negligence of the plaintiff in remaining in the baggage car, and admitting that the baggage car was a place of greater danger than the passenger car, and that the plaintiff would not have been injured if he had not been there, his presence there with the knowledge of the conductor, made it defendant's duty to exercise care to avoid injuring him while there; and if injury resulted from want of such care, the defendant is liable. If the injury resulted from want of such care, *i. e.*, negligence on defendant's part—such negligence, and not plaintiff's fault in being in the baggage car, would be the immediate and direct—the more proximate—cause of the injury, and defendant would be responsible for the same. In our opinion there was evidence in the case for the consideration of the jury in reference to these views of the law, and from which they might reasonably find that plaintiff's negligence in this case was not contributory to the injury received by him." Order denying new trial affirmed.

Riding on Loaded Car.—*GRADIN v. ST. PAUL & DULUTH R'y Co.*, 80 Minn. 217 (1883), was an action for damages for injury to a person in the employ of a lumber company under contract with defendant to handle its cars, who was injured while riding on a loaded car. Judgment for plaintiff affirmed. The question turned upon whether plaintiff was a trespasser. The court held that he was there with the consent of defendant's conductor, and defendant was responsible for negligence of its servants.

Person Not Passenger.—In *ORCUTT v. NORTHERN PACIFIC R. R. Co.*, 45 Minn. 368 (1891), the syllabus by the court states the case as follows: "At Minnesota Transfer, plaintiff delivered to defendant a car in which was his horse, some furniture, and other property, to be transported over its line of road to Sauk Rapids, under a contract by which he agreed to load, unload, and reload, and to feed, water, and attend the stock, at his own expense and risk while at the company's stock yards or on the cars; and he assumed the duty of securely placing the stock in the cars, and keeping the same securely locked and fastened, so as to prevent the escape of stock. The car arrived at Sauk Rapids in the night. The plaintiff left the car for a few minutes, and, on its being placed on a side track, returned to it, and lay down. Soon after he was injured by an engine running against the car. Held, that, although not then a passenger, yet, if prudent attention to his horse rendered it proper for him to be in the car (and of that the jury is to judge), he was rightfully there, and defendant owed him a duty of care to avoid injuring him." Order denying new trial after dismissal of suit reversed.

Falling into Cattle Guard.—In *FINNEGAN v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'y Co.*, 48 Minn. 378 (1891), plaintiff after alighting from one of defendant's trains proceeded to walk along defendant's track and fell into a cattle guard and was injured. Held, that the facts did not justify a recovery, and action rightly dismissed.

Injured on Cable Car.—In *WATSON v. ST. PAUL CITY R'y Co.*, 42 Minn. 46 (1889), plaintiff was injured while a passenger on one of defendant's cable cars, and recovered judgment for \$8,000. Defendant appealed on the ground of excessive damages, but the Supreme Court affirmed the judgment, finding no ground to interfere with the decision of the trial court.

Struck by Street Car.—In *MILLER v. ST. PAUL CITY R'y Co.*, 42 Minn. 454 (1890), plaintiff was injured by being struck by a street car as he was attempting to get on one of defendant's street cars, and recovered judgment for \$2,500. Judgment was reversed on the ground of plaintiff's contributory negligence in not exercising proper care in avoiding danger while waiting for a car.

WEIGHTMAN v. LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY.

Supreme Court, Mississippi, March, 1893.

[Reported in 70 Miss. 563.]

SICK INFANT PASSENGER DYING FROM EXPOSURE—CARRIED PAST DESTINATION—CARRIER LIABLE.—Where a boy, sixteen years old, was taken sick away from home and was put aboard one of defendant's trains to be taken home, the ticket agent and conductor being informed of his condition and the necessity of attention while on the journey and assistance in being carried from train at his destination, but the defendant's servants carried the boy beyond his destination and put him off the train at night at a station without accommodation and permitted him to remain there without attention for many hours, and the boy, soon after reaching home, died as a result of exposure and neglect, the railroad company was held liable and judgment dismissing the suit was reversed (1).

FROM the Circuit Court of Warren County. Hon. J. D. Gilland, Judge.

"The declaration in this case alleges that on July 18, 1892, Noel

1. **SEVIER v. VICKSBURG & MERIDIAN R.R. Co.**, 61 Miss. 8 (1883), an action for damages by a sick passenger, is discussed and distinguished in the case at bar.

Among other actions in Mississippi relating to Persons Injured on Trains, etc., are the following:

SOUTHERN R. R. Co. v. KENDRICK, 40 Miss. 375 (1866), an action for damages by a female passenger for being carried past station, and being compelled to walk along track in charge of two negroes, putting her in bodily exposure and mental anguish. Judgment for plaintiff reversed on the ground of erroneous instructions as to damages.

ILLINOIS CENTRAL R. R. Co. v. CRUDUP, 63 Miss. 291 (1885), an action for damages for death of plaintiff's intestate, a mail agent, who was injured while in the performance of his

duties on defendant's train, due to a collision, from which injuries he died. Judgment for plaintiff reversed, erroneous instructions in damages having been given, and evidence offered by defendant on damages improperly excluded.

LOUISVILLE, NEW ORLEANS & TEXAS R. R. Co. v. CONROY, 63 Miss. 562 (1886), action for damages for injuries inflicted upon a laborer employed by a contractor, who while rightfully on defendant's car was injured by the overturning of the same due to a collision with a cow on the track. Judgment for plaintiff for \$100 affirmed, the court holding that the plaintiff was not a fellow-servant of the engineer running the train.

In **CARSON v. LEATHERS**, 57 Miss. 650, a steamboat company was held liable for failing to notify passenger of arrival at destination, plaintiff

Weightman, the 16-year-old son of appellant, while from home, was taken very seriously ill, and was put aboard defendant's train at Arkansas City as a passenger, destined for Vicksburg, Mississippi, the home of himself and parents; that the ticket agent of defendant was apprised of his condition before the purchase of his ticket, and that the conductor of the train was so apprised, and was informed that he was away from home, with no one to accompany him; that both the ticket agent and conductor were informed that he would not only need attention along the road, but would also probably have to be carried from the train when he arrived at Vicksburg; that they were fully informed of all the circumstances, and of the reason why appellant's son would go home by railroad, and not by boat, it being deemed important that he should go speedily; that, with a knowledge of all the facts, he was received as a passenger on the train, with the promise of the conductor to give him the necessary attention along the journey, and to have him carefully assisted from the train at Vicksburg; that when the train reached Vicksburg, young Weightman was unconscious, and hence unable to help himself, and in that state was suffered to remain on the train until it had reached a point about thirty miles south of Vicksburg, where he was put off, about two o'clock at night, at a little station where there were no accommodations; that he was there permitted to remain, without care or attention, for about forty hours, when he was taken back to Vicksburg by the employees of defendant; that, soon after reaching home, he died as a result of the exposure and neglect."

From a judgment sustaining a demurrer to the declaration and dismissing the case, plaintiff appeals. *Judgment reversed.*

GEORGE ANDERSON, for appellant.

MAYES & HARRIS, for appellee.

Woods, J.— The case, on its facts presented by the declaration, is widely different from that of *Sevier v. Railroad Co.*, 61 Miss. 8. In that case the plaintiff got on a train of the railroad company at Vicksburg, to be transported to Jackson. Before reaching Jackson, the plaintiff, who had gotten on the train while sick with a fever, notified the conductor of the train that he was sick and drowsy, and wished to sleep, but feared he might not awake at Jackson, his point

having gotten off at wrong landing under direction of strangers acting on instructions of clerk.

In *WILSON v. NEW ORLEANS & N. E. R. R. Co.*, 68 Miss. 9, plaintiff hav-

ing fallen asleep while on train was carried past destination. Held, that he had no cause of action for sickness caused by fright in going back to his station after being put off train.

of debarkation. The conductor thereupon told plaintiff that he might safely go to sleep, and that he should be awakened at Jackson. The plaintiff accordingly lay down and slept, and gave no thought to being awake when the train should reach Jackson, and neither roused himself nor was aroused by the conductor at Jackson, but was carried four miles east of that station while so asleep and sick, when the train was stopped, the plaintiff permitted to get off at night in the woods, and walk back to Jackson.

In the case at bar the passenger was received into and upon the train by the ticket agent's and conductor's consent and agreement, after having been informed of his serious illness and his inability to care for himself, and of the necessity there would be, on the railroad's part, to have him assisted from the car when the train should arrive at Vicksburg, the place of his debarkation. The declaration alleges that the passenger, "being violently ill, was overcome by weakness, drowsiness and unconsciousness to such an extent that when the train upon which he was a passenger arrived at Vicksburg, he was totally unconscious thereof"; that the conductor negligently failed to have the passenger awakened and put off, but permitted him to remain on the train, without any attention or care given him, and carried him to a small station, called Ingleside, about thirty miles south of Vicksburg, where he was put off the train, about two o'clock at night, where there was no one to take care of him, or to protect him in his then condition, and he was permitted to remain in the depot at Ingleside, without care or attention, from 2 A. M. Tuesday to 5 P. M. on the Wednesday following—about forty hours—when he was placed upon a north-bound train of defendant's, and carried back to Vicksburg; that on thus reaching the house of his father at Vicksburg, medical aid was at once summoned, but it was found to be too late, and he was pronounced to be beyond hope of recovery, and very soon thereafter died. It is also alleged that, by reason of his having no care and attention during the forty hours he was left at the station house at Ingleside, he grew very much worse, and that death would not have occurred but for the negligent, wanton and reckless conduct of defendant.

How wide the limits stand between the one case and the other—the case of Sevier and the case of Weightman—the preceding brief statements of fact will vividly make to appear. In the one case, a man, not sick enough to make his condition known before or on entering the train, takes passage, and before reaching his destination (the whole trip a short one of about forty miles only), tells the

conductor that he has a fever and is drowsy, and wants to sleep, and secures the conductor's promise to rouse him at Jackson. The conductor—under no sort of obligation, contractual or otherwise, to keep his promise—forgets the passenger until four miles out from Jackson, when he permits the passenger to leave the train and return to his destination. In the other case—the one at bar—the passenger is received into and upon the train after his sick and helpless condition had been made known to the ticket agent and the conductor, together with the reasons for desiring to have him carried by rail rather than by steamer, and the necessity for the attention of the railway employees on his journey and in his removal from the train at Vicksburg, his point of debarkation, and after their agreement to give him needed care on the way, and to have him carried from the train. He is not cared for or carried from the train, though unconscious at the time, but is carried thirty miles further south, and put off at 2 o'clock A. M., in a little wayside depot, with no one to care for him, and is permitted there to remain, without care or attention, until nearly forty hours later, when he is carried back to Vicksburg to die.

That the wanton, reckless, inhuman conduct of the defendant in putting an almost dying man from its train, under the revolting circumstances set out in the declaration in this case creates liability on the wrongdoer's part, we do not hesitate to affirm. It was the wanton exposure to almost certain death by the railroad company of one not a trespasser—a passenger to whom it owed a duty; at least the duty which common humanity proclaims, and which the general law of civilized Christendom echoes, not to wantonly or recklessly injure another. Trespassers on trains and tracks, wrongdoers and swindling dead beats, may not be willfully or wantonly injured, or subjected to imminent risks of deadly peril. This humane doctrine is embodied in our laws; it is rooted in all laws of every enlightened kingdom or commonwealth under the wide circuit of the sun.

Is authority thought to be needful to support so plain and just a rule of conduct? They are at hand and abundant. Says Beach, in his admirable little compendium of the Law of Railways: "A railway company must treat such of its passengers as are sick or infirm with humanity and consideration." In the case of *Conolly v. Railroad Co.*, 41 La. Ann. 57, this rule is declared with emphasis. In the syllabus, which Fenner, J., who delivered the opinion of the court, approves, it is said: "Although a common carrier of passengers owes obligations to its well passengers as well as to

those who are sick, and is bound to protect the rights of both, and, although, when the condition of one passenger from sickness or otherwise, is such as to be inconsistent with the safety, health or even comfort of his fellow-passengers, regard for the rights of the latter will authorize the carrier to terminate the carriage by excluding him; yet, this right cannot be exercised arbitrarily or inhumanly, or without due care and provision for the safety and well-being of the ejected passenger." In this case, the ejected passenger had fallen helpless and almost insensible to the floor of the car, vomiting severely. His condition was offensive to other passengers. Thinking him drunk, the car driver, with the help of a passenger, removed Conolly from the car and laid him down in the open street, where he remained for four hours, on a bleak day in December, and was at length removed by the police authorities to the hospital, where he died the next day. Miserable as this case is on its facts, how far short of the reckless and wanton disregard of all laws displayed in the case at bar does it fall!

In delivering the opinion of the court in the case of *Railroad Co. v. Sullivan*, 81 Ky. 624 (1), where it appeared that Sullivan was drunk, and unable or unwilling to pay his fare, and was ejected by the conductor, and exposed to freezing weather, while in a helpless condition, whereby his toes, some of his fingers and part of his heel were frozen, and necessitated their amputation, LEWIS, J., said: "The right, generally, of railroad companies to put off their trains persons who refuse to pay their fare when requested by the conductor, may be conceded, but does it follow that this right may be exercised in such manner, under such circumstances or against a person in such mental or physical condition as that death or serious bodily harm will necessarily, or even probably, result from putting him off? It is true that appellee, by refusing to pay his fare, became, technically, a trespasser, but it is well settled that a party may, in some cases, recover for the gross negligence of another, notwithstanding he may have been a trespasser upon the rights of the other at the time he received the injury." See, too, the cases cited by the learned judge in his opinion. To the same effect will be found *Railroad Co. v. Moore*, 83 Va. 827; *Railroad Co. v. Weber*, Adm'r, 33 Kan. 543; *Railway Co. v. Powell*, Adm'r, 40 Ind. 37; *Haley*,

1. *Louis., Cin. & Lex. R. R. Co. v. Sullivan*, 81 Ky. 624, is reported in 8 Am. Neg. Cas. 286.

Adm'r, *v.* Railway Co., 21 Iowa, 15 (1); Railway Co. *v.* Miller, 19 Mich. 305 (2).

Judgment of court below reversed, demurrer overruled and case remanded for further proceedings.

STAFFORD *v.* HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

Court of Appeals, Kansas City, Missouri, May, 1886.

[Reported in 22 Mo. App. 333.]

PASSENGER INJURED BY FALLING FROM STATION PLATFORM AFTER ALIGHTING FROM TRAIN.—Where it appeared that a passenger after alighting from a train at a station walked along the platform that was raised about three feet above the ground, to some steps that he and other passengers had used before and the platform being slippery from ice and unlighted and the night very dark he missed the steps and fell from the platform, the company was guilty of inexcusable negligence in not having a light on the platform and liable for the injuries sustained.

OBLIGATIONS OF RAILROADS TO FURNISH SAFE LANDINGS.—The law requires railroads to provide reasonably safe landings for their passengers, as also, like means of access to and egress from their stations and premises (3).

APPEAL from Livingston Circuit Court. *Judgment affirmed.*

"This is an action to recover damages for personal injuries sustained by plaintiff, a passenger on defendant's railroad train, in

1. *Haley v. Chicago & N. W. R'y Co.*, 21 Iowa, 15, is reported in 8 Am. Neg. Cas. 230.

2. *Great Western R'y Co. v. Miller*, 19 Mich. 305, is reported in 8 Am. Neg. Cas. 421.

3. *Among other actions in the Missouri Appellate Courts relating to Persons Injured at Stations, etc., are the following:*

GUNDERMAN *v.* MISSOURI, KANSAS & TEXAS R'Y CO., 58 Mo. App. 370 (1894), where it was held that a passenger who while waiting for a train in the night time strolled along the platform and crossed from one end of it to the back of the station where

there was another platform for the use of freight only and poorly lighted and fell into an excavation, was guilty of negligence and cannot recover for injuries sustained. It was also held that carriers of passengers are liable for negligence, but are not insurers of the safety of their passengers, who while waiting for the arrival of a train must occupy only the premises provided for them. Judgment for plaintiff reversed.

WALLER *v.* MISSOURI, KANSAS & TEXAS R'Y CO., 59 Mo. App. 410 (1894), where plaintiff while at defendant's station for the purpose of becoming a passenger, fell over a box left standing on the platform and

leaving its station at Chillicothe, Missouri. The facts, in substance, are that plaintiff was a passenger on one of defendant's trains of cars, to be carried for hire to its station at Chillicothe. The train was due at this station at 11 P. M.; but did not arrive until 11:30 P. M.

"The plaintiff lived at Chillicothe, and was familiar with the station and its surroundings. The night was unusually dark, so much so that one could not well see his way without the aid of a light. The train came from the east, going west, stopping on the south side of the depot. In order to go home, which was the usual travelled way for passengers leaving the depot to go up town, he had to pass west along the platform until he reached the southwest corner of the depot building, then, turning north, he had to pass along the west side of the building along the platform to the northwest corner. The platform here was three feet from the ground, and in order to reach the ground he had to pass down a narrow stairway or flight of steps.

"The platform on the south side was lower than along the west side, so that in passing from the south to the west side he ascended

was injured, the said station and platform not being lighted. Judgment for plaintiff for \$1,000 affirmed.

The court distinguished the *GUNDERMAN* case (*supra*) by showing that "there the plaintiff sauntered away from that portion of the depot and platforms designed for and used by the travelling public, and went where he, as a passenger, had no business or right to be; while here, the evidence shows the plaintiff, Walker, was occupying that portion of the depot and platform which the travelling public uniformly and, by defendant's consent, ordinarily and habitually occupied and used."

As to lighting of station platforms: "A railway company is bound to keep its stations and premises in proper repair, and properly lighted; to furnish a safe ingress and egress for, and to prevent injury to its passengers who come upon them."

CHANCE v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y CO., 10 Mo.

App. 351 (1881), where it was held that a passenger who is injured after leaving a train at night, by reason of a defect in a bridge which was maintained by another person on the company's grounds and which the passenger attempted to cross by direction of the brakeman of the car, may recover damages from the company. Judgment for plaintiff for \$350 affirmed.

WINKLER v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R'Y CO., 21 Mo. App. 99 (1886), where it was held that where it appeared that a passenger was carried past the station about two hundred yards in the night time and there alighted supposing it was the station and in walking back to the station on the railroad track, there being no other practicable path, fell through a trestle or cattle guard and was injured, the company was liable. It was also held that the wrong done by the railroad in carrying the passenger beyond the station

a flight of steps. There were no railings, or other barriers along the outer edge of the platform on the west side. A lamp was usually kept burning at the northwest corner of the depot building to light the west platform and the steps descending therefrom, down which the plaintiff had to pass. But this lamp was not lighted that night, nor did the defendant have any other light which fell upon this platform and the steps at the northwest corner. There were some hacks standing on the west side, which had lamps, but the evidence quite clearly showed that they gave no light at the steps in question, at the time of the accident. The platform and steps were covered with ice.

"On alighting from the train, the plaintiff started for his home, and, passing from the south side, up the steps to the west side, he approached the steps, and, supposing he had reached them, stepped to go on them, when he fell to the ground, crippling him in his foot and ankle, and otherwise slightly bruising his body.

"The negligence imputed to the defendant in the petition, was the improper construction of the platform, the failure to erect and maintain any railing or other barrier to prevent persons from stepping or falling from the platform in the night time, and the failure to have any light at the place of injury.

and putting him off at the point it did, was the proximate cause of the injury, and his failure to demand to be taken back to the station was not a waiver of his rights, as he was not aware that he had been carried beyond the station. In such a case it is erroneous to exclude evidence of the expense of medical treatment and the length of time the plaintiff was incapacitated from business in consequence of the injury. Judgment for plaintiff for \$1,000 affirmed.

CROW v. WABASH, ST. LOUIS & PACIFIC R'y Co., 23 Mo. App. 357 (1886), where plaintiff was struck by a train as he was walking along track to station, judgment for plaintiff for \$800 was reversed for the giving of erroneous instructions permitting recovery on the ground that the engineer might have seen plaintiff, regardless of the fact whether or not he did see him. The instruction should

have been so framed as to require the jury to find that defendant's servant did see plaintiff in time to have avoided the accident by the exercise of due effort.

NURSE v. ST. LOUIS & SAN FRANCISCO R'y Co., 61 Mo. App. 67 (1895), where it was held that where the conductor of a freight train is approached about nightfall by a passenger who was riding in a box car with some furniture and live stock and is asked by the passenger for some oil to fill his lamp and the conductor tells the passenger to come back at the next stop and the oil would be given to him and the passenger at the next stop attempts to do so and it being dark falls into a culvert and is injured, the company is liable. Judgment for plaintiff for \$2,500 affirmed. (There was a verdict for \$4,500, but plaintiff entered a remittitur for \$2,000).

"The answer, after tendering the general issue, pleaded contributory negligence on the part of plaintiff.

"On behalf of plaintiff the court gave the following instructions:

"1. If the jury believe from the evidence that on the night of December 29, 1883, the defendant's passenger train arrived at its depot in Chillicothe, and that plaintiff came to Chillicothe on said train as a passenger for hire, and alighted therefrom at said depot, and that, at the time of the arrival of said train, the night was dark, and that defendant's said depot was surrounded by a platform which was some three feet higher than the ground, and that no railing or other barrier had been constructed or maintained around the edge of said platform to keep persons having business thereon from walking off or falling therefrom, and that it was the way furnished by defendant for persons to go to and from their trains, and that it was the custom and habit of persons getting off of and upon defendant's trains at said depot to pass over and across said platform, and that defendant and its servants well knew that it was so used, and that, at the time the said train arrived and the plaintiff alighted therefrom and upon said platform, the defendant's servants failed and neglected to have such lights on said platform as were necessary on account of the darkness of the night, and the character and condition of said platform, to enable persons arriving on defendant's said trains to pass in safety from said platform, and that plaintiff, in passing from said train across said platform, and without fault on his part, walked off of or fell from the same, and was thereby injured, then the jury will find for the plaintiff and assess his damages at such sum as they shall believe from the evidence he is entitled to receive, not exceeding \$5,000.

"2. If the jury find from the evidence that, on the night of December 29, 1883, the defendant's passenger train arrived at defendant's depot at Chillicothe, Missouri, and that plaintiff came to Chillicothe as a passenger for hire on said train and alighted therefrom, and that, on the arrival of said train, the night was dark and defendant's servants had failed to have the platform there surrounding its depot properly lighted up, so as to enable passengers arriving by said train to pass safely over said platform from said train, and that said platform had been negligently and improperly constructed for the purposes of a platform for a passenger depot, and for the use of passengers getting off and upon its trains at said depot at such time, and that plaintiff, in passing from said train across said platform on his way home, and over that part of said platform used by persons

in getting off and upon defendant's trains at said depot, without fault upon his part, and because of the failure of defendant's servants to have said platform lighted up, and the negligent and improper construction of said platform, walked off or fell from said platform, and was thereby injured, the jury will find for plaintiff and assess his damages at such sum as he may be entitled to receive, under the evidence in the case, not exceeding \$5,000.

"'3. If the jury find for plaintiff, they may, in determining the damages plaintiff has sustained, take into consideration all the evidence in the case as to the character and extent of the injuries he may have received, the bodily pain he may have undergone by reason thereof, the time lost, if any, on account of the same, and the result of said injuries upon the use of the limb injured, and assess his damages at such sum as they find he is entitled to receive, under the evidence in the case, not exceeding \$5,000.'

"On the part of defendant, the court instructed the jury as follows:

"'2. The jury are instructed that the failure of defendant to have a railing around the depot platform at the place of the injury was not negligence.

"'3. If the jury believe from the evidence that that part of the platform in proof where the injury occurred was sufficiently lighted by defendant and others to enable a party using due care to avoid such an accident as the one sued for, they must find for defendant.

"'4. By due care, as used in the foregoing instruction, is meant such care as an ordinarily prudent man would exercise under the circumstances, as detailed by witnesses, including the darkness of the night, the height of the platform from the ground, and the slippery condition of the platform caused by snow and ice.'

"The court refused to instruct, as requested by defendant, to the effect that if plaintiff could have passed safely from the depot by another way known to him, he could not recover.

"The jury returned a verdict for plaintiff, assessing his damages at \$450. Defendant appealed."

STRONG & MOSMAN, for appellant.

FRANK SHEETZ and L. H. WATERS, for respondent.

Phillips, P. J.— I. The only questions for determination are as to the action of the court in giving and refusing instructions. It is strenuously urged by defendant that the first instruction given for plaintiff is in conflict with the second given on behalf of defendant. The contention is, that the said second instruction declared that the

failure to have a railing on the platform was not negligence, whereas the said first instruction predicated a right of recovery on account of the absence of such railing. This, we hold, is not a fair construction of the first instruction. Its palpable import is, that if the jury found that the platform was some three feet above the ground, without railings to protect persons from walking off, and the defendant failed and neglected to have necessary lights there on such a night to enable passengers to pass from the platform in safety, then they could find for plaintiff. It does not tell the jury they could find the existence of negligence from the fact of the absence of such railing. While defendant could have escaped responsibility for the injury, had it railed in the platform at that point, yet, not having done so, it became its duty to its passengers to protect them in the night time against the danger of falling therefrom by keeping a light at such place. This is the obvious purport of the direction to the jury. It is incredible that the jury could have been misled by it, when the court in another instruction explicitly told them that the defendant was not required to maintain any railing there.

II. The same objection is lodged against the second instruction given on behalf of plaintiff. We think it is quite apparent that this instruction imputes two grounds of negligence to the defendant; one for failing to have the platform properly lighted, and the other that the "platform had been negligently and improperly constructed for the purpose of a platform for a passenger depot."

Wherein, then, is this instruction out of harmony with the second given for defendant? It refers to the manner of the construction of the platform for the purposes of a passenger depot. But, by the instruction given for defendant, the court simply advised the jury that, in considering this question of the construction of the platform, the mere absence of a railing should be excluded. Its effect, therefore, was to restrict the inquiry and limit the conclusion of the jury to the ascertainment of such defect outside of the want of such railing.

To meet this inevitable construction as to the meaning of the instruction, the learned counsel for defendant contends that the petition is based solely, in this particular, on the failure to have the railing.

We do not consider this a liberal construction of the petition. The petition imputes two defects to this platform. It charges that the platform was negligently and improperly constructed. It then specified that it "was constructed for freight depot purposes, and

was built around said depot some three feet above the ground." This is a distinct defect alleged. The charge is, that while using it as a passenger depot, they constructed the platform on the plan of a freight depot, leaving the platform high for the convenience of receiving and discharging freights. It was left three feet above the ground, so as to render it dangerous for a passenger to miss his way or footing and fall from it to the ground. The petition then follows up this averment with the further additional allegation, that no railing was maintained around the platform to protect passengers against the danger incident to the negligent construction. And as more clearly indicating the purpose of the pleader to aver two defects in this particular, the statement is followed with the allegation: "that defendant knew, etc., that said platform was not properly constructed, and that there should have been erected along the outer edge a railing or other barrier." Thus the two things are enumerated and the charge is, that defendant knew of the existence of both.

It was for the jury to say, from all the facts, whether a platform for the use of passengers at such a point, built three feet above ground, was properly or negligently constructed. And there was evidence from which the jury might not unreasonably infer that it was unnecessarily and negligently left in that condition. The evidence showed that the platform on the south side had been originally constructed just as on the west side. But it had been lowered so as to leave it only twelve or eighteen inches above the ground, while this was left three feet high, along which passengers, coming and going to its trains, passed day and night.

The second instruction was based on this aspect of the case. Although the jury in the second instruction given for defendant were told to disregard the want of any railing, thereby excluding all evidence as to that, they were not directed not to consider the question of the negligent construction of this platform in other respects. And even if it were conceded that defendant's construction of the petition is admissible, it would not follow that the verdict should be disturbed. It is observable that the instruction under review does not state the two grounds of negligence, the defective construction of the platform, and the absence of any light, in the alternative, and direct the jury that they could find for the plaintiff if they found either defect to exist. But the instruction is in the conjunctive, and required the jury to find that both the defects existed, and that no necessary light was present. So we are bound to presume that the jury, if influenced at all by this instruction, found that defendant was

guilty of negligence in not having a light at the place in question. In such case, the verdict would stand with or without the other fact. *Gaty v. Sack*, 19 Mo. App. 471.

It was most inexcusable negligence on the part of defendant not to have a light at the northwest corner of the depot. And there being really no contradictory proof touching this fact, and nothing to palliate the omission, we do not see how the jury could have returned a different verdict.

III. Counsel for defendant seem to intimate in their brief that the high degree of care, which the law exacts of railroad carriers toward passengers, does not extend to the obligation to provide for their safety after leaving the car. Of course the matter of due care and vigilance is always relative, having regard, in such a case as this, to the danger and peril to be anticipated. But the law does require of railroads to provide reasonably safe landings for its passengers, as, also, like means of access to and egress from its stations and premises. The law "requires of the defendants (the railroad companies) due regard for the safety of passengers, as well in the location, construction, and arrangement of their station buildings, platforms, and means of egress, as in their previous transportation. It is argued in this case that the platforms were not properly constructed, lighted or guarded, and that the defendants were guilty of negligence in backing down the engine without proper lights or signals. The bare statement of these matters shows that it is appropriately the province of the jury to settle them." *Gaynor v. Old Colony, etc., Ry. Co.*, 100 Mass. 215 (1); *Patten v. Chicago, etc., Ry. Co.*, 32 Wis. 329, 333, 334 (2).

IV. It is also objected that the instruction given for plaintiff did not properly submit to the jury the issue respecting the contributory negligence of the plaintiff. Both of the instructions employ the terms "without fault on his (plaintiff's) part." If the injury was inflicted without plaintiff's fault, certainly he was not guilty of contributing to it. We know of no decision disapproving of such an instruction.

Other questions are discussed by counsel in brief, but as they present no principle not well settled against defendant's contention, and as the judgment was for the right party, we will not review them. The other judges concurring, the judgment of the Circuit Court is affirmed.

1. There is a note of this case on page 439, *ante*.

2. The Patten case is reported in 7 Am. Neg. Cas. 191 and 201.

MILLER v. ST. LOUIS RAILROAD COMPANY.

Court of Appeals, St. Louis, Missouri, April, 1878.

[Reported in 5 Mo. App. 471.]

PASSENGER'S ELBOW RESTING ON WINDOW SILL OF STREET CAR.—In an action to recover damages for injuries sustained by plaintiff whose arm while resting on the window sill of one of defendant's street cars was struck by another car, an instruction that if the accident was due to improper width of cars or condition of track plaintiff could recover was erroneous, and evidence on that point, under the pleadings, should not have been admitted.

NEGLIGENCE FOR JURY.—The question of negligence or unskillfulness on the part of defendant's servants in running the car is entirely for the jury.

APPEAL from St. Louis Circuit Court. The facts appear in the opinion. *Judgment reversed.*

SMITH P. GALT, for appellant.

REESE & HICKS and DRYDEN & DRYDEN, for respondent.

Bakewell, J.—This action is for damages for injuries suffered by plaintiff whilst a passenger on one of the street cars of defendant. The allegations of the petition are that, by the negligence, imprudence, unskillfulness, and carelessness of the agents and employees of defendant, a car on defendant's road, in charge of defendant's servants, collided with and raked against the car of defendant in which plaintiff was being carried, and broke his arm and otherwise injured him, to his damage \$10,000. The answer is a general denial.

There was evidence tending to show that plaintiff, at the time of the accident, was sitting in the car with his elbow and arm on the window sill, and his wrist and hand outside, grasping the frame of the window; that the car passing in the opposite direction rubbed against the car in which plaintiff was sitting, mashed his hand, drove his arm back, and broke it above the elbow. Plaintiff suffered intensely, carried his arm in splints for three months, was still suffering, at times, at the date of the trial, and his arm is permanently injured, so that plaintiff, who is a farmer and stock-dealer, is permanently disabled from doing hard work, such as is required on a

farm. There was testimony that the track was in bad condition at the place where the accident occurred, and elsewhere (1).

There was also testimony tending to show that plaintiff had his elbow outside the window at the time of the occurrence; that the car did not collide, or touch; that the track was in good condition at the point of accident. There is no direct testimony that either of the cars was off the rails at the time of the accident. A passenger swears that he warned plaintiff, before the accident, to take his arm in. Plaintiff says he heard no such warning. The plaintiff's statements as to his position in the car are corroborated by the conductor and a passenger, and are contradicted by a passenger. There was a verdict and judgment for plaintiff for \$1,908.25, and defendant appeals.

1. It is contended by respondent that the bill of exceptions was

1. *Among other actions in the Missouri Appellate Courts relating to Persons Injured on Trains, etc., are the following:*

Derailment.—*NORTON v. ST. LOUIS & HANNIBAL R'Y CO.*, 40 Mo. App. 642 (1890), was an action for damages for injuries to a passenger on one of defendant's freight trains caused by the derailment and upsetting of the caboose. Plaintiff recovered judgment for \$650 which, on appeal, was reversed on the ground of erroneous instruction as to damages recoverable for medical expenses, nursing, etc., when there was no evidence as to such expense.

In *DIMMITT v. HANNIBAL & ST. JOSEPH R. R. CO.*, 40 Mo. App. 654 (1890), plaintiff was injured by jumping from one of defendant's trains after it had left the track. The switch appears to have been closed, causing the train to be violently thrown off the track. Judgment for plaintiff for \$2,000 affirmed.

Riding on pass.—*BRYAN v. MISSOURI PACIFIC R'Y CO.*, 32 Mo. App. 228 (1888), was an action by a person riding on a free pass who was injured in a derailment of the train.

A further claim was made for injuries alleged to have resulted from lack of heat in the car. The defense was that the pass released defendant from liability. Judgment for plaintiff affirmed, the court holding that trial court properly instructed the jury that the pass was no defense.

See, also, *PEMBROKE v. HANNIBAL & ST. JOSEPH R. R. CO.*, 32 Mo. App. 61 (1888), as to person riding on pass.

Stockman injured.—*TULEY v. CHICAGO, BURLINGTON & QUINCY R. R. CO.*, 41 Mo. App. 432 (1890), was an action by a stock drover, travelling on drover's ticket, for injuries received on car caused by the coupling of an engine to the caboose of the freight train, the violent jerk throwing plaintiff from his seat. Plaintiff was sitting on top of the car when he was injured. Judgment for plaintiff reversed, the court holding that plaintiff was guilty of contributory negligence in occupying the position he was at the time of the accident, and that the evidence showed that the coupling was done in the usual manner, the engine handled properly and the impact was not sufficient to disturb anything inside the caboose.

presented out of time, and improperly allowed. It appears that the cause was tried at the December term, and that, on January 22 of that term, the judge announced that the motion for a new trial would be overruled; and then, by consent of parties, suspended the entry of judgment until the next term, in order to allow time to prepare the bill of exceptions. The entry that the motion for a new trial was overruled was made on February 5, and at the February term; and then, against the objection of respondent, the court granted appellant, on February 9, time until March 1 (a day of the February term) to prepare his bill of exceptions. On February 22, appellant handed his bill of exceptions to respondent, who then protested that it was out of time under the rule of court; and on February 24, the trial judge sealed the bill, against the objection of respondent, who insisted that such action was in violation of the sixteenth rule of the Circuit Court, adopted at general term, and then in force and binding upon the court at special term. This rule provides that the bill of exceptions shall be presented to the opposite party within five days after the motion is overruled, who shall return the same within three days.

A bill of exceptions must be signed during the term at which the cause is finally disposed of, unless this is waived by stipulation filed, or by entry of record. This is a settled rule of practice from which no departure is allowed in this State. But we have already decided (*Saulsbury v. Alexander*, 1 Mo. App. 209) that we will not review the discretion of the Circuit Court in permitting a bill of exceptions to be signed and filed beyond the time limited by its own rules, if done within the time prescribed by statute. We are asked to reconsider that decision, on the ground of the peculiar organization of the St. Louis Circuit Court, and the distinct powers and functions of general term of that court, which, it is contended, give its rules in this respect the force of a legislative enactment, not to be suspended or disregarded at the discretion of the judge at special term. We see no reason whatever for overruling the decision in *Saulsbury v. Alexander*. To say that the rules made by the Circuit Court in general term are as unbending as a statute, and that the trial judges of that court are to be deprived of the ordinary discretionary power of suspending, when they see sufficient cause, the operation of a rule of court in a particular case, might work a denial of justice.

2. Affidavits are filed by three of the jurors, to the effect that they arrived at the measure of damages by dividing by twelve the sum of the several amounts which each juror privately jotted down

as the amount upon which he determined. Independently of the fact that the affidavits of two of the jurors show that, after the average had been thus ascertained, the amount was then considered and freely assented to by each juror, in which case it has been repeatedly held that such a method of arriving at a verdict in a damage suit is no ground for new trial (12 Pick. 521; 2 Dall. 55; 1 Bibb, 398), it is well settled that the testimony of jurors is not to be admitted to impeach their conduct and attack their verdict. *Dorr v. Fenno*, 12 Pick. 521; *Pratte v. Coffman*, 33 Mo. 72.

3. The court, at the instance of plaintiff, instructed the jury substantially as follows:

1. That if the injury was caused by the carelessness of defendant's agents in running or managing its cars, or by improper construction or location of its tracks, or by the use of cars of improper width, without negligence of plaintiff directly contributing to the injury, they should find for the plaintiff.

2. If defendant's cars had sometimes brushed together, so as to endanger passengers sitting as plaintiff sat, and if plaintiff was sitting with his elbow out, or with his elbow on the sill and his hand grasping the window frame, and received no warning from any employee of defendant, and his hand and arm were broken by collision, or running too close together, of defendant's cars, defendant is liable.

3. It is not necessary that either car should have been off the track; the injury, if it occurred to plaintiff whilst a passenger, by the collision or rubbing of the cars, is presumptive evidence of negligence of defendant.

4. Remote negligence of plaintiff will not excuse any negligence of defendant which is shown to have been the proximate cause of the injury.

5. In estimating damages, plaintiff's condition in life, pursuits, bodily and mental sufferings, loss of time, and direct pecuniary loss may be considered.

For defendant, the court gave instructions as to credibility of witnesses, and contributory negligence, and the burden of proof, which we need not set out. The court refused to instruct that if plaintiff's arm was in an unsafe position, and he learned this from another passenger, and might have withdrawn his arm and did not do so, he cannot recover; but, of its own motion, directed the jury that such facts might be considered in determining the question of negligence.

Defendant asked the court to instruct the jury: 1. That if the

tracks of defendant were laid by the direction of the city engineer, and were, at the date of the accident, in the place where first laid, then defendant was not in fault for the location of its tracks. 2. That if plaintiff was accustomed to ride on defendant's cars, and knew that cars ran on the west track, and had his arm out of the window when hurt, he cannot recover. 3. That the jury, though they may believe from the evidence that the cars rubbed together, or that there were indentations in defendant's track at other points, cannot presume that there were such indentations, or that the cars rubbed, where the accident occurred. 4. That the measure of damages is, a fair compensation for actual injury. 5. That, on all the evidence, the plaintiff is not entitled to recover.

It has been repeatedly held, that where a passenger of mature years projects his elbow, or any part of his body, from the window of a car drawn on a railroad by steam power, this is negligence *per se*, and in many cases, in different States, it has been held, that where the passenger thus negligently exposes his person from the window of the car and is injured by contact with any object, he cannot recover damages from the railroad company, though it be shown that the defendant was negligent in permitting the obstruction which caused the accident to remain so near its track. It has been so decided in Massachusetts, Pennsylvania, New York, Indiana, Kentucky, and Maryland; though the contrary is held in Wisconsin and Illinois. We do not refer to the cases, though we have examined them, because they will be found cited and reviewed in *Railroad Co. v. Andrews*, 39 Md. 329 (1). The cases in which such exposure is considered negligence *per se* are well considered; and in Pennsylvania, the case of *Railroad Co. v. Kennard*, in which a contrary doctrine was announced, has been long since overruled (2). It does not necessarily follow, however, that because the exposure of the person from the window of an ordinary railroad carriage moved by steam is negligence, that the same exposure from the window of a street car is so. The motive power is much more under control in one case than the other, whether we speak of the carriage in which the passenger is, or of anything likely to approach it from a parallel track; and the speed is less.

1. An abstract of this case is reported on page 421, *ante*.

2. *New Jersey R. R. Co. v. Kennard*, 21 Pa. 203, is overruled by *Pittsburg, etc., R. R. Co. v. McClurg*, 56 Pa. St. 294. See these cases

reported with the *Pennsylvania* cases in Vol. 10 Am. Neg. Cas.

Compare the cases relating to accidents similar to the one at bar reported under their respective States in this volume.

We are by no means prepared to say that to expose the elbow to some extent from the window of a street car is always and under all circumstances negligence. As to this, each case must stand upon its own facts; and what is, or is not, ordinary prudence as to the position which one shall assume when sitting at the open window of a street car, running upon rails and drawn by horses under the charge of a driver, is perhaps not to be determined by any arbitrary rule. But even if it should be determined that to project one's arm from the window of a street car is negligence *per se*, it would by no means follow that one whose arm was broken when sitting in a car in that position would be absolutely precluded from recovery in a suit for damages, when injured by the negligence of another. As we have already had occasion to remark, in cases of a somewhat similar character heretofore decided by this court, the negligence of plaintiff may be entirely immaterial. If a remote condition, it is unimportant. The law, in cases of this kind, looks at the proximate and operating cause of the injury; and, where one who has been negligent himself is injured by the recklessness and carelessness of another, the party whose acts are the efficient cause of the injury may be liable.

Let us take the present case, and suppose that the plaintiff's arm was exposed from the window, but in such a way that, from the construction of the car it was protected from injury from any passing object, provided that the rails on both tracks were in good condition; that if each of these parallel tracks were in a condition such as defendants were bound constantly to maintain, there could be no reasonable probability of danger from such exposure of the arm; and that, owing to an undue displacement of a rail, or a sudden depression on either side of the track, this car, or a passing car, was tilted over in such way, at the point of the accident, that, before plaintiff could withdraw his arm, the cars were brought so nearly together as to rub together, or so nearly touch, that plaintiff's arm was struck and broken, it might well be that the direct and immediate cause of the injury was the bad condition of the car track, and not the carelessness of plaintiff, and that a recovery might be had, even though plaintiff was careless to some degree. *Leduke v. Railroad Co.*, 4 Mo. App. 485; *Frick v. Railroad Co.*, 4 Mo. App. 435.

In the case before us, there was no evidence whatever that the accident was occasioned by any negligence on the part of the servants of defendant managing and conducting either of the meeting cars. Both cars were going at a slow trot, and it is not shown that any officer or servant of defendant saw plaintiff's arm out of the

window until after the accident occurred. Under the pleadings, evidence of the condition of defendant's track should not have been admitted against the objection of defendant, and the first instruction as to construction of the track or improper width of the cars, should have been refused. If the defendant was negligent in these respects, that was not the negligence of its agents conducting or driving its cars at the time of the accident; and if it is claimed that the accident was owing to a depression in the track at the point where the accident occurred, that fact should have appeared in the pleadings, so that defendant might have notice of the charge he was to meet. Under a general allegation of negligence, the plaintiff cannot recover for damages occasioned by the bad condition of the track. *Frick v. Railroad Co.*, *supra*. If that objection had been removed by an amendment of the pleadings, it would still have been improper to admit testimony as to the condition of the track at other points, and at another date from the time of the accident. This was done on the trial, against defendant's objection.

The second instruction for plaintiff is too broad, and seems to make the noninterference of the conductor, combined with the fact that the cars ran too close, conclusive against defendant. Was the conductor bound to warn plaintiff not to put his elbow out, if he saw it on the sill of the window? Or was he bound to watch, to see that all passengers kept their elbows inside of the car? We think not. It seems clear enough that the cars ran too near; but that may have happened without defendant's fault. It is possible that a car might leave the track for an instant without fault in the driver or defect in the track. The question of negligence or unskillfulness was entirely for the jury, and this instruction seems to take it from them.

As to the third instruction for plaintiff, it may be said that where the thing that causes the accident is shown to be under the management of the carrier, and the accident such as would not happen in the ordinary course of management, the accident, if unexplained, is reasonable evidence of negligence, but where, from the character of the accident it appears that it could not have happened had there not been improper exposure on the part of the passenger, the accident itself can hardly raise the presumption of negligence.

4. As the case must go back for a retrial, we may say that there is nothing in the objection of appellant to the testimony in support of plaintiff's character. His character for truth was attacked by defendant, not by direct evidence, but by the character of the cross-examination, and by evidence of statements by him, out of court,

different from those sworn to by him on the stand. It is now well settled that where this is the case, it is competent for the party calling the witness to give evidence of his general good character. 1 Greenl. on Ev., sec. 462; *Paine v. Tilden*, 20 Vt. 554; 31 N. C. 14; 12 N. Y. 236; 34 Barb. 256.

The judgment of the Circuit Court is reversed and the cause remanded. All concur.

GERSTLE V. THE UNION PACIFIC RAILWAY COMPANY.

Court of Appeals, Kansas City, Missouri, November, 1886.

[Reported in 23 Mo. App. 361.]

CONDUCTOR'S PISTOL DISCHARGED BY STRIKING RAIL OF CAR PLATFORM AND PASSENGER RIDING ON PLATFORM SHOT.—Where a passenger riding on the platform of one of defendant's cars was injured by the discharge of the conductor's pistol, the question whether plaintiff was in the exercise of due care was properly submitted to the jury, and it was not error to refuse to charge that riding upon the platform was negligence *per se*.

APPEAL from verdict and judgment for plaintiff in the Jackson Circuit Court. The facts appear in the opinion. *Judgment affirmed.*

JOHN W. BEEBE, for appellant.

GAGE, LADD & SMALL, for respondent.

Ellison, J.—The evidence in this case shows that the respondent received the injuries for which the suit is brought, under the following circumstances: He was a travelling man, and a passenger on defendant's train from Hays City, Kansas, westward. This train stopped at Ellis for supper. Before its arrival at Hays, some tramps were discovered stealing their passage on the train. After his supper at Ellis, being just after dark in the evening, the respondent seated himself in the smoking car, which was next to the baggage car, and the train started. The trainmen immediately discovered the same tramps on the first platform of the baggage car, and before it had gone fifty yards, stopped the train and put them off. The tramps ran forward, crossed a bridge, and as the train crossed, again jumped on the same platform. The train was again stopped, and they were again put off. This was repeated several times; during this time the conductor had fired a pistol one or more times to scare them away. At some time after the first stoppage the respondent rose from his seat, went forward to the platform, and standing on

the rear platform of the baggage car, looked forward to see what was going on. Finally the train again started, the conductor and trainmen being still on the ground beside the cars, and the respondent started to return to his seat in the smoking car. As he was passing from the platform of the baggage car to that of the smoking car, the conductor, holding his lantern in one hand and his pistol in the other, caught hold of the railings and swung himself upon the steps, his pistol was exploded as his hand holding the pistol struck the rail, the ball entering the mouth of respondent, seriously injuring him.

At the close of plaintiff's case, defendant offered a demurrer to the evidence, which was overruled. After the close of defendant's evidence, it offered several instructions declaring in effect that plaintiff's being on the platform was contributory negligence sufficient to prevent his recovery. These were refused. Defendant tried the case below on the theory that it was responsible for the conduct of the conductor in the use of a pistol, and having done so, we raise no question in that regard. The instructions given for plaintiff and defendant submitted to the jury whether plaintiff's being on the platform of the car, under the circumstances, was such negligence as contributed to the injury complained of. There was a verdict for plaintiff, and defendant appeals.

There is no proof in this cause of any statutory regulation of the State of Kansas as to the right of passengers to be upon the platform of cars. Neither is there any proof of plaintiff being aware of any regulation, in that regard, by the railway company. The defendant's demurrer to the testimony, and the complaint urged against the trial court's action in refusing its instructions, in effect, presents the question whether being on the car platform, though there be seats inside, in the absence of law or regulation against it, is negligence *per se*.

The question has been determined in other tribunals in this and other States, that it was not negligence as a matter of law. *Burns v. Railroad*, 50 Mo. 139; *Goodrich v. Railroad*, 29 Hun, 50; *Maguire v. Railroad*, 115 Mass. 239. In each of these cases it was held to be error for the court to declare, as matter of law, such act on the part of plaintiff to be negligence and held proper for the court to submit to the jury whether under all the circumstances the plaintiff was in the exercise of due care when he met with the accident. The cases of *Burns* and *Maguire* were for injuries on street cars, while that of *Goodrich* was on a railway, and it was said in the latter case, quoting

from an opinion of the New York Court of Appeals, that "independent of the mandate of the statute, it is not, even in the case of steam cars, negligence *per se* for a passenger to stand upon the front platform of a moving car."

Our conclusion is that the instructions offered by defendant were properly refused, and those granted plaintiff were properly given, and we, therefore, affirm the judgment. All concur.

SMOTHERMAN v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Court of Appeals, St. Louis, Missouri, February, 1888.

[Reported in 29 Mo. App. 265.]

RIDING ON PLATFORM OF CABOOSE CAR—SWITCHING TRAIN—CONTRIBUTORY NEGLIGENCE.—Where plaintiff was injured by being thrown from the platform of the caboose car of a freight train by a jar caused in switching some freight cars against the car, and it appeared there was ample room in the caboose and that plaintiff was familiar with the custom of switching local freight trains, and had seen printed regulations not to stand or ride on the platform and knew of the danger in so riding, he was guilty of contributory negligence and could not recover damages (1).

APPEAL from the Scott Circuit Court. The facts are stated in the opinion. *Judgment reversed.*

GEO. H. BENTON, for appellant.

WILLIAM HUNTER, for respondent.

Rombauer, J.—The action is one to recover damages for personal injuries sustained by plaintiff by being thrown from the platform of the caboose car of a freight train by a jar caused in switching

1. *Riding on platform of car.*—**SAARE v. UNION R'y Co.**, 20 Mo. App. 211 (1886), was an action to recover damages for injuries to a boy, ten years of age, who fell off one of defendant's horse cars while standing upon the step of front platform, the car being crowded with passengers. The accident happened while the driver was at the rear of the car collecting fares, the horses suddenly starting up and giving the car a jerk. Judgment for plaintiff affirmed, the

evidence being held to show gross negligence on part of defendant.

In **CHOATE v. MISSOURI PACIFIC R'y Co.**, 67 Mo. App. 105 (1896), plaintiff, owing to crowded condition of train, was compelled to stand upon rear platform of the chair car, and while there was injured by the violent backing of a car which defendant attached to the train, which threw plaintiff to the ground. Judgment for plaintiff for \$500 affirmed.

some freight cars against the caboose. The answer is the general issue and the plea of contributory negligence. The trial before a jury resulted in a verdict for plaintiff.

The plaintiff was the only witness in his own behalf as to the cause and circumstances of the accident, and the following facts were shown by his own evidence: He had lived in the vicinity of the road for three years and had frequently travelled on local freight trains of the company. He knew that these local freight trains were engaged in taking on and leaving off cars at the different stations. He knew that when couplings are made the cars can come together without striking, but often come together with considerable force. He had seen on passenger cars of the company, printed regulations not to stand or ride on the platform. He knew that it was more dangerous to ride on the platform than in the interior of the car.

On the day of the accident, the plaintiff was travelling as a passenger from Bismarck to Blodgett in a caboose attached to a local freight train. There was ample room in the caboose, which was furnished with sitting accommodations. When reaching the intermediate station of Mine LaMotte the train stopped for switching purposes. The plaintiff had no business at the station, but left his seat in the caboose and went out on the platform. He paid no attention to the switching, his attention being arrested as a matter of curiosity in another direction.

He attempted to step off the platform, and while in so doing one of the cars, which were being switched, struck the caboose, and the plaintiff was precipitated to the ground by the jar, receiving the injuries complained of. The jar, as plaintiff stated, was violent, and he believed the cars were not properly braked.

At the close of the plaintiff's evidence the defendant asked the court to instruct the jury that the plaintiff could not recover. The court refused so to instruct. The defendant thereupon gave evidence tending to show that the plaintiff was repeatedly warned during the journey not to stand upon the platform, and that the switching at the station was done in a careful and customary manner.

The refusal of the court to nonsuit the plaintiff is the main error complained of.

In the recent case of *Harris v. Railroad*, 89 Mo. 236 (1), the Supreme Court declared that the following instruction embodied a correct declaration of law as applicable to the facts therein stated:

1. See this case reported with the *Missouri Supreme Court cases*, p. 518, *post*.

"If the jury believe, from the evidence, that plaintiff knew, or, by the exercise of ordinary care, could have known, that the train had stopped to do some switching, and, by the exercise of ordinary care, could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would likely be produced in the caboose, and that the plaintiff then, without thinking about the approach of the cars, and without paying any attention to whether the cars were approaching or not, left his seat and stood up in the car, and was thrown down and injured, when he would not have been had he kept his seat, or resumed the same before the cars struck, then the plaintiff was guilty of such contributory negligence as bars his recovery, and the jury must find for the defendant."

In view of this ruling there can be no recovery in this case on plaintiff's own evidence. The plaintiff here admits all the facts which are hypothetically assumed in the instruction referred to. He admits that he knew that part of the train was likely to be backed against the part of the train to which the caboose was attached; he knew that some concussion or jar was likely to be produced in the caboose. He admits that he paid no attention to the switching; that there was no necessity for his leaving his safe and secure seat within the caboose; that the accident could not possibly have happened had he kept his seat. In every element, the facts of the present case are more favorable to defendant upon plaintiff's own showing, than the facts assumed in the above instruction.

It is needless to decide whether plaintiff's own evidence brings him within the provision of section 800, of the Revised Statutes, as he was fully aware of the company's regulations prohibiting his standing upon the platform. Regardless of the statute, there can be no recovery when the plaintiff's own evidence, as in this case, shows contributory negligence on his own part. *Henze v. Railroad*, 71 Mo. 636; *Powell v. Railroad*, 76 Mo. 80; *Gavett v. Railroad*, 16 Gray, 501 (1); *Quinn v. Railroad*, 51 Ill. 495 (2); *Railroad v. Houston*, 95 U. S. 697 (3).

All the judges concurring, the judgment is reversed.

DERAILMENT OF TRAIN—DEFECTIVE TRACK—EXCESSIVE DAMAGES.—In an action brought by Martha A. Furnish, being joined therein by her husband, to recover of defendant

1. The Gavett case is reported in 3 Am. Neg. Cas. 742.
2. Reported on page 246, *ante*.
3. The Houston case is reported in 7 Am. Neg. Cas. 345.

damages for injuries sustained by her while a passenger on one of defendant's cars, it appeared in evidence that on February 6, 1886, she took passage on an accommodation train consisting of a locomotive and tender, a baggage car and two passenger coaches at Independence, Missouri, intending to go to Kansas City. When the train arrived within a mile and a half of Kansas City the locomotive and all the cars left the track on an embankment, and after leaving the rails the train tipped over and rested on its side. The plaintiff introduced evidence tending to prove that at the point where the locomotive left the track a number of ties were broken off and splintered, some of them were decayed and rotten, and that the tire of one of the drive wheels, which had been placed thereon shortly before the accident, was three-eighths of an inch thicker than the one on the companion drive wheel, and that the difference in thickness had been called to the attention of defendant's assistant master mechanic, while the locomotive was in the repair shop shortly before the accident. The effect of this difference was to make one drive wheel larger than the other. There was evidence that the south rail, at the point where the locomotive left the track, was bent inwardly toward the north rail. Defendant introduced evidence tending to show that the ties, at the point where the train left the track, were sound ties, capable of holding the spikes; that the track at that point had been inspected daily for a long time; that it had been inspected two hours before the accident occurred, and there was nothing to indicate any defect in the track or roadbed. Defendant also gave evidence tending to prove that the engine was inspected by the engineer immediately before it left Independence on that trip, and it was found in perfect condition as far as he could discover. The master mechanic, assistant master mechanic and engineer of defendant, all testified that the difference in the thickness of the tire would have no effect upon the safety of the locomotive, nor any tendency to throw it from the track. The assistant master mechanic denied that his attention had been called to the difference in the thickness of the tire by the witness who testified he had done so, and further testified that the latter had nothing to do with the engine when it was in the shop for repairs (1).

1. *Among other actions in Missouri Supreme Court relating to Derailment of Trains, are the following:*

In *HIPSLEY v. KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R'y Co.*, 88 Mo. 348 (1886), plaintiff was injured by reason of derailment of the train on which he was travelling, and on the trial of the case was nonsuited. On appeal judgment was reversed, a *prima facie* case having been made out by plaintiff's proof of being a passenger, that he was in-

jured by no fault on his part, and the derailment of the train, which must be rebutted by defendant.

Following the rule in *LEMON v. CHANSLOR*, 68 Mo. 341 (1879), where plaintiff was injured by the breaking down of a hack in which he was a passenger. The Supreme Court held that when the evidence shows that a passenger, without fault of his own, receives injury by the overturning or breaking down of the vehicle in which he is being carried, a *prima*

Plaintiff's evidence as to her injuries was that, after the car in which she was riding was derailed, she was found lying on the top of the car with her feet through a window and a cushion across her face. She was taken out of the wreck, and placed upon some cushions and afterwards removed to a hotel in Kansas City where she remained for twenty-five days. She was examined by a physician the afternoon of the accident. He testified that he found a great deal of tenderness in the small of the back, increased pain upon pressure radiating for several inches around the point of injury, with increased sensibility of the limbs, and that she was suffering a great deal from the fall. At that time there was no external evidence of an injury, but in a day or two afterwards there was some discoloration along the back and side. After her return home he saw her several times and found her but little improved. The evidence of her family physician was to the effect that he had known and prescribed for her since 1879; considered her in delicate health for two or three years from that time, and up to within two years she had had attacks of neuralgia, often complaining of her back, but for eighteen months prior to her injury he had not prescribed for her; that her injuries had rendered her an invalid, unable to walk or attend to any of her household duties, and that he believed she would be unable to walk for a long period. On cross-examination, he testified that, in his opinion, her spinal cord was not injured by the accident; that she had no indications of paralysis and that she would probably in time recover so as to get around, but would, in all probability, always have a weak back. Another physician, called as an expert, testified that he had seen her twice, the first time in April, 1886, and the second time a week before the trial; that in some respects she had improved, in others not; that he believed her injuries were permanent, but that the probabilities were that she would get better; that she had got better. Testimony was given by nonprofessional witnesses, that she had not been able to walk prior to the trial. Trial resulted in verdict and judgment for plaintiffs for \$15,000. On appeal by defendant the Supreme Court reviewed the instructions given and refused and held that there was no reversible

facie case is made out for him, and the onus is cast upon the carrier of relieving himself from the responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented.

In *WAGNER v. MISSOURI PACIFIC RY CO.*, 97 Mo. 512 (1888), an action by a wife for wrongful killing of her husband caused by derailment of train, it was held that where the evidence showed that the train was a

special freight train, consisting of engine, tender, box car and flat cars, the engine running in reversed position on a rough track at dangerous speed, and deceased with others was riding on a flat car with knowledge of defendant's servants in charge of the train and without warning that said car was dangerous to ride upon, plaintiff was entitled to have the jury pass upon the question of negligence, and judgment for defendant was reversed.

error, but on the point as to excessive damages the court reversed the judgment unless plaintiff remitted \$5,000 thereof. Opinion by BARCLAY, J. ADAMS & BUCKNER, appeared for appellant; GATES & WALLACE, for respondents. *Supreme Court, Missouri, October Term, 1890.* **Furnish et al. v. Missouri Pacific Railway Co.**, 102 Mo. 438.

HARRIS v. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

Supreme Court, Missouri, April, 1886.

[Reported in 89 Mo. 233.]

PASSENGER ON FREIGHT TRAIN.—Discomforts and dangers are more incident to travel on freight than on passenger trains and hence calling for a higher degree of care on the part of a passenger on the former than on the latter.

PASSENGER INJURED ON FREIGHT TRAIN—CONTRIBUTORY NEGLIGENCE.—Where a passenger on a freight train, when the train came to a stop some distance from a station, left his seat in the caboose and walked towards the door and heard the rest of the train moving but paid no attention to it, and before he reached the door he was knocked down and injured by the rest of the train coupling with the caboose, when he would have been uninjured if he had kept his seat, he was guilty of such contributory negligence as will bar his recovery (1).

APPEAL from Marion Circuit Court. The facts are stated in the opinion. *Judgment reversed.*

VINTON PIKE and STRONG & MOSMAN, for appellant.

W. N. BOULWARE, for respondent.

Norton, J.—This is an action to recover damages for injuries to plaintiff while a passenger on one of defendant's trains, and alleged to have been occasioned by the carelessness and negligence of defendant's servants in managing the train, whereby he was thrown down on the floor of the car and seriously injured. The answer was a general denial, and also set up contributory negligence on the part of plaintiff. The case is before us on defendant's appeal

1. *Followed* in *Smotherman v. St. Louis, etc., R'y Co.*, 29 Mo. App. 265, 9 Am. Neg. Cas. 513, *ante*.

In *SHERMAN v. HANNIBAL & ST. JOSEPH R. R. Co.*, 72 Mo. 62 (1880), child getting on freight train without knowledge of conductor, paying

no fare, and being permitted to remain there when discovered, held entitled to claim benefit of statute requiring adjustable gate on front platform to secure safety of passengers. Held also, entitled to care due to passenger.

from the judgment rendered for plaintiff. At the close of plaintiff's evidence defendant asked an instruction by way of demurrer to it, which the court overruled, and this action of the court is assigned as one of the grounds of error.

The only witness on behalf of plaintiff, as to the circumstances under which the injury complained of was inflicted, was the plaintiff himself, who testified, in substance, that he took passage in a caboose attached to one of defendant's freight trains, to be carried from Palmyra to West Quincy; that the train, before reaching the depot at West Quincy, stopped about a quarter of a mile therefrom; that ten or fifteen minutes after it stopped he got up to see if he was to get off there, it occurring to him that he had seen a notice that passengers would be expected to alight when the train stopped; that he knew the train was not at the depot, that the train generally went further east toward the depot than it did on this occasion before it stopped; never had known it to stop so far away to let passengers off, supposed they were going down to the depot till they remained there longer than usual; that while he was walking to the door of the car a coupling was made, causing a more violent concussion or jar than he ever before experienced, though he had been in the habit of riding on trains for many years, which threw him down on the floor of the car, inflicting the injury for which he sued; that he may have heard the cars moving; that he was thinking of business and did not notice particularly; that he supposed he could have heard the cars while he was seated, and that he did probably hear them, but did not remember; that when he got up from his seat some person was sitting in a chair, and that on getting up after the concussion or jar which threw him down, he saw the chair on top of the person who occupied it.

As the demurrer to the evidence admits not only the truth of the facts disclosed by it, but also every inference in favor of the plaintiff which could be reasonably deduced from them, we are of opinion that the court did not err in overruling the demurrer. The train men and several others who were passengers in the caboose when the cars were coupled were introduced as witnesses on behalf of defendant, all of whom testified that the coupling was made in the usual manner, and that there was no jolt or jar more than was usually incident to the coupling of freight cars, flatly contradicting plaintiff in these particulars. In view of this state of facts, and that discomforts and dangers are more incident to travel on freight than on passenger trains, and hence calling for a higher degree of care on

the part of the passenger, the eleventh instruction asked by defendant and refused by the court ought to have been given, the giving of which is fully warranted by the cases of *Henze v. Railroad*, 71 Mo. 636, and *Powell v. Railroad*, 76 Mo. 80.

The instruction is as follows:

"If the jury believe from the evidence that plaintiff knew, or by the exercise of ordinary care could have known, that the train had stopped to do some switching, and by the exercise of ordinary care could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would likely be produced in the caboose, and that the plaintiff then, without thinking about the approach of the cars, and without paying any attention to whether the cars were approaching or not, left his seat and stood up in the car, and was thrown down and injured, when he would not have been had he kept his seat, or resumed the same before the cars struck, then the plaintiff was guilty of such contributory negligence as bars his recovery, and the jury must find for defendant."

For the refusal to give this instruction the judgment is reversed and the cause remanded. All concur.

STANDING ON STEPS OF PLATFORM OF STREET CAR—PASSENGER KILLED.—In an action to recover damages for the death of plaintiff's intestate, caused by alleged negligence of defendant, it appeared from the evidence that the accident occurred in the night time, on the Franklin avenue railroad track, and at a switch or turn-out on the road; that the deceased was on defendant's car which was coming into the city from the Fair grounds; that the car was very much crowded; that the deceased was standing on the steps of the platform of the car; and that whilst this car was passing another car of defendant, which was standing on the switch, the body of deceased was brought in contact with the said stationary car, and that he was thus crushed and killed. It was in evidence that deceased, whilst standing on the steps of the moving car, was holding on to the iron railing of the window of the car and that his body was swinging out some distance from the body of the car at the time, or just before, the accident occurred; that he was told by one of the witnesses that he was in a dangerous position—that he had better get farther in, or get off the car; and witness also testified that he could have avoided the danger if he had chosen to do so. There was a conflict of testimony as to where the stationary car was standing on the switch, whether in the center, or more to one end. There was conflict, also, as to whether the cars, in passing, would have touched each other; but the preponderance of testimony was, that they would have passed without touching. The

distance between the tracks, at the center of the switch, was three feet, two inches. There was no evidence to show that the driver knew that the deceased was on the car. Verdict and judgment for plaintiff. On appeal judgment was affirmed. The court, after reviewing at length many authorities on the law of carriers, and of contributory negligence, showing the rule that while carriers of passengers are not insurers of the passenger's safety they are bound to the utmost care and skill in the performance of their duty, and that where the carrier's negligence is the cause of injury and the passenger is free from fault, the carrier is liable, said: "In the case under consideration, the evidence shows that the railway company were in the habit of carrying passengers on the platforms of its cars and collecting fare for the same. The position in which the deceased placed himself was perhaps unsafe, but it was not prohibited; and the evidence further shows that owing to the crowded state of the cars, there was no other place he could take. Had there been any objection to carrying him in that manner, it would have been competent for the company or its employees to have put him off the car; but not having done so, they were bound to carry him with skill, prudence and care. There is nothing to show that he failed to exercise ordinary prudence and care. He might, in all probability, have avoided the catastrophe by being on the alert and exercising extraordinary vigilance, but such was not required of him. He stood within a few feet of the driver, and the driver knew, or at least it was his duty to know, the close proximity of the cars when they were about to collide, and also the position of the passengers on the platform. His driving steadily ahead, under such circumstances, stamps the act with recklessness and gross negligence. The question of negligence was for the jury, and was properly submitted to them under instructions which fairly and correctly presented the true issue in the case and the law arising thereon. The instructions given by the court for the respondent and the appellant, when taken together, are unobjectionable, and properly apply the law to the case. It was not error in refusing the additional instructions asked for by the appellant, as the whole matter had been already fairly presented." Judgment affirmed. Opinion by WAGNER, J. SHARP & BROADHEAD, for appellant; CLINE & JAMISON, for respondent. *Supreme Court, Missouri, March Term, 1866. Huelsenkamp v. Citizen Railway Co., 37 Mo. 537.*

BOY FALLING FROM STREET CAR PLATFORM.—In *MUEHLHAUSEN et al. v. St. Louis R. R. Co., 91 Mo. 332 (1886)*, the Supreme Court, on the appeal from judgment for plaintiffs in an action for damages for death of a boy caused by falling from the platform of a street car of defendant, in reviewing the case, said: "The evidence on behalf of plaintiffs tended to show that Eddie Muehlhausen, a boy about eight years of age, in company with other children, was returning from school, and that the driver of one of defendant's cars stopped it to allow two or three girl children to

enter the car, some of the witnesses testifying that he stopped at their call, and others that he beckoned to them, and stopped; or slackened the speed of the car for them to get on. It also tended to show that the girls got on at the east end of the front platform of the car, and, also, that the Muehlhausen boy boarded the car about the same time, whether at the front or rear end, does not clearly appear, but it does appear, that after getting on he stood on the front platform by the side of the driver, till after riding a short distance, about two blocks, he either fell from, or jumped off, the east side of the front platform, and was run over and killed, some of the witnesses testifying that he jumped off, the boy, himself, on being asked by the person who picked him up just after the accident, how it happened, replied by saying, 'I fell off the front platform.' The evidence also tended to show, that on the east side of the front platform, at which the boy either fell, or jumped off, there was no gate at the time, and that when the children boarded the car there was no conductor in charge of it, nor was there any at the time the accident happened, but the car was in the sole care of the driver, the conductor having previously left the car. The evidence also tended to show that the driver was aware of the presence of deceased on the car, but that nothing was said by the driver to the boy, nor by the boy to the driver, and that no fare was demanded of him, nor did he pay any. The evidence on the part of defendant, as given by the driver, tended to show that previous to the accident he had removed the gate off the east side of the front platform to let a passenger off, at his request, but that, after he got off, he put the gate back securely in its place; that he did not see the boy get off, and did not know that he was going to do so; that he did not invite the girls to get on the car, nor stop it for them to get on, but that while he was going slowly, they jumped on the car, and also a lot of boys jumped on, the deceased being one of them; that all of them got on at the rear platform; that the east front gate was securely fastened; a boy could not get out there unless he removed the gate. Defendant seeks a reversal of the judgment for alleged error committed by the court in rejecting evidence, and in refusing and giving instructions. On the trial, defendant offered to prove by its conductors, who knew what, before the death of deceased, was the effect and result to the boys who jumped on the cars down on that portion of the road, as these boys did; what was the effect, result, and danger, to them to stop the cars and put them off; what the boys would do; and further offered to prove, by the driver of the car, why he did not stop the car on this occasion and put the deceased and other boys off. This evidence the court rejected, and, we think, properly. Whatever boys might do when put off, or whatever reason the driver may have had for not putting the boy off could not relieve the company from a liability for an injury inflicted by the negligence of defendant while he was on by the permission and consent of those in charge of the car, and under circumstances entitling him to the same care which it was the duty of the company to bestow or observe in carrying passengers." * * *

The ninth of defendant's instructions was properly refused, because it ignored the duty imposed by law on the defendant to keep an adjustable gate on the front end to effectually prevent passengers from getting off there. In support of this instruction it is argued by counsel that, inasmuch as it is provided by section 9 of an Act of the General Assembly, approved January 16, 1860 (Acts, page 518), (defendant company being one of the companies mentioned in said act) that: "said railroad companies shall not be liable for injuries to persons occasioned by their getting on or off the cars at the front or forward end of the car"; that if deceased got off the front end of the car and was thereby injured, the defendant is not liable, although deceased was so young in years as not to comprehend the danger incident to such an act, and, although the company may have had no gate in its place to prevent his getting off, as is provided by section 4, Acts 1869, page 207, which is as follows: "No passenger shall be permitted to get on or off any car, by the front platform, while the car is in motion, and each car shall be furnished with such adjustable gate, or guard, as shall effectually prevent it." It is insisted by counsel that this last act is for the protection of passengers, and means nothing more than if not complied with by defendant, and by reason thereof a passenger should be thrown, or fall off, the defendant *per se* would be liable. If the Act means nothing more than this, the necessity for its passage is not apparent, because the Act of 1860 only exempts the company from liability for injury to any person sustaining such injury by *getting on or off* the front end of a car, but does not deny the right of a passenger to recover, who, through the negligence of a defendant company, was either thrown or caused to fall off such front end, or platform. *McKeon v. Railroad*, 42 Mo. 79. The Act of 1869 was passed to secure safety of life and limb, and should not be narrowly construed. In view of this, and the fact that children of an age too young to comprehend the danger of getting off the front end of a car, in motion, were liable to become passengers as well as adults, it is not going too far to say that it was doubtless within the humane purposes of this Act to provide against such danger for this class, by not only requiring the companies to furnish an adjustable gate for the forward end of the car, but such an one as would not only prevent, but effectually prevent, them from getting off at such end. The instruction wholly ignored the duty imposed by the Act of 1869, and for that reason was properly refused." Judgment for plaintiffs for \$5,000 affirmed. Opinion by NORTON, Ch. J. S. P. GALT, appeared for appellant; G. A. FINKELBURG, LEO RASSIEUR and DEXTER TIFFANY, for respondent.

SEYMOUR V. CITIZENS' RAILWAY COMPANY.

Supreme Court, Missouri, February, 1893.

[Reported in 114 Mo. 266.]

RIDING ON PLATFORM OF HORSE CAR NOT NEGLIGENCE *PER SE*.—It is not negligence *per se* for a passenger to ride on the platform of a horse car whether there is room inside the car or not.

RIDING ON STEP BY DIRECTION OF DRIVER NOT NEGLIGENCE *PER SE*.—Where a passenger on a crowded car stood by direction of the driver on the step outside of the gate placed between the step and the platform, and was injured by being struck by a derrick adjoining the track, the question of contributory negligence was for the jury.

DUTY OF RAILROAD COMPANY TO PASSENGERS RIDING ON STEP.—The track having been placed near the derrick on the morning of the day of the accident it was the duty of the defendant to use all reasonable care to avoid exposing passengers to danger in view of the fact that they were allowed to ride on the steps of the cars.

STATUTE—PERSONS ALIGHTING FROM FRONT PLATFORM.—The Act of the Legislature of January 16, 1860, exempting railroad companies in St. Louis from liability for injuries to passengers getting on or off the front platform of cars does not apply.

APPEAL from St. Louis City Circuit Court. The facts appear in the opinion. *Judgment reversed.*

A. R. TAYLOR, for appellant.

SMITH P. GALT, for respondent.

Black, P. J.—The plaintiff brought this suit against the defendant, a street railway company, to recover damages for injuries while a passenger on one of defendant's cars. At the close of the plaintiff's evidence, the defendant interposed a demurrer thereto, which was sustained, and the plaintiff appealed.

The evidence discloses the following facts: The defendant's road runs east and west along Easton avenue in the city of St. Louis. At the time of the accident the defendant was converting its horse railroad into a cable road. The accident occurred on Sunday, the eighteenth of December, 1887. On that day the plaintiff had been engaged in finishing up the new track by putting gravel between the paving stones at a point near Taylor avenue, which was about three-fourths of a mile west of the place of the accident. The plaintiff was in the employ of contractors, and was not in the employ of defendant. At five o'clock in the evening of that day he took a car

going east. According to his evidence he got on the car when it stopped at Taylor avenue. It seems the car was full of passengers so that there was neither sitting nor standing room on the inside. He first went to the rear platform, but found so many persons standing on it that he could not get on. He then went to the forward platform and found that crowded with passengers. There was an iron gate at the front platform extending from the outer side of the car across the platform to the dashboard, and the gate extended down to within a few inches of a step leading up to the platform, which step extended out six or seven inches beyond the outer line of the car. He and another person by the name of Kelly stood on this step. After going one or two blocks the driver, who was at the dashboard, said to them, "you had better take out the gate and get inside." They took the gate out but could not find standing room on the platform. Plaintiff said: "I will try to sit down here and hold the gate." It seems he proposed to sit on the edge of the platform, resting his feet on the step, and held the gate in his lap, but the driver would not allow him to do that. Being asked why he did not stand on the inside of the gate and put it up, he said, "I could not stand there; I had no room on the step inside of the gate." The driver then told him to get on the outside and put the gate in its place. Plaintiff and Kelly then put the gate in place and stood on the step outside of it. They occupied this position while going a distance of about a half mile. The plaintiff held to the car with his left hand and to the gate with his right with his dinner bucket on the right arm. Kelly held to the gate with one hand and to the dashboard with the other. When they reached Sarah street the plaintiff was struck by a projecting timber of a derrick standing on the street and knocked off. He fell upon the side of an embankment extending some eighteen inches or two feet above the track; his feet slipped under the car wheels. Both legs were crushed so as to necessitate amputation below the knees.

The defendant company had nothing to do with this derrick. It was a large contrivance used by contractors in constructing a sewer and was moved along as the work of the sewer progressed. It consisted of timbers, pulleys, a track and a dumping apparatus. The end next the car was about four feet high and the other end much higher. At the lower end a timber projected out within ten inches of the passing car, and it was this projecting timber which struck the plaintiff. A policeman who reached the place a few minutes after the accident says he found a nail in the end of the timber with

an unlighted lamp hanging on it. This projecting timber was on a line with the lower edge of the windows of the car, that is to say half way up the car.

It appears Kelly, the other person standing on the step, was not injured. The evidence tends to show that he was leaning over the dashboard talking to the driver.

The derrick had been at or near this place for several days, and the plaintiff had seen it in going to and from his work. He knew they were constructing a sewer at that point. He says he did not see the derrick at the time of the accident, and did not know how close it was to the car. The derrick was on the south side of the street car track, which track had been moved from the north side of the street on the morning of the day of the accident, thus throwing the cars nearer to the projecting timber than before.

Plaintiff says that at the time of the accident he was looking out sideways, more to the east than to the north; that he was looking for teams on the road belonging to his boss. His evidence tends to show that he stated on the former trial that he feared these wagons might catch him and he was looking out for them, but on the last trial he says he was just looking to see where they were. It appears the car was moving on a down grade, and one witness says it was going "as fast as he ever saw a car go." The plaintiff says the car was going "as fast as they could travel at that grade." The plaintiff had not paid his fare at the time of the accident, but says he had the money in his pocket to pay it when demanded.

When speaking of the time the driver told him to replace the gate, the plaintiff was asked this question: "Do you know whether the driver and conductor were the same persons on those cars; do they have any extra conductor or extra driver?" A. "I think this was a man that used to change off with the other driver. I mean he took charge of the car for a certain distance on the road while the other man collected the fares. He then got off and went back to another car, as near as I can tell." The plaintiff says he had observed these horse cars for two months; that they carried passengers on the platform when crowded, and that on such occasions they carried passengers on the front and rear steps.

1. It is conceded on all hands that the plaintiff was a passenger on this car; and the question here is whether he was, as a matter of law, guilty of contributory negligence in riding on the step on the outside of the gate. The law is now well settled that it is not negligence *per se* on the part of a passenger on a horse car to ride on the platform, and this is true whether there is or is not room in the car.

The passenger being on the platform when injured by the negligence of the driver or other servant of the defendant, the question of contributory negligence is one for the jury and not for the court. *Burns v. Railroad*, 50 Mo. 139 (1); *Railroad v. Walling*, 97 Pa. St. 55 (2); *Maguire v. Railroad*, 115 Mass. 239 (3); *Railroad v. May*, 27 A. & E. R. R. Cases, 151; *Meesel v. Railroad*, 8 Allen, 234 (4); *Nolan v. Railroad*, 87 N. Y. 63 (5); *Fleck v. Railroad*, 134 Mass. 480 (6); *Upham v. Railroad*, 85 Mich. 12 (7); *Lehr v. Railroad*, 118 N. Y. 556 (8).

There can be no doubt but riding on the step or platform of such a car is attended with more danger than riding in the car; and if a passenger will take a position upon such a place in violation of the rules of the company and the warning of the servants in charge of the car he is guilty of negligence. *Wills v. Railroad*, 129 Mass. 351 (9). Here the closed gate was of itself a warning that this front platform was not a proper place to stand or even to gain access to the car. Nothing more appearing than this, that the plaintiff took this position on the step with the closed gate between him and the platform and that he was knocked off by coming in contact with the derrick, we should have no hesitancy in upholding the ruling of the trial court. These facts only appearing the plaintiff should be held guilty of contributory negligence. Indeed these facts only appearing we do not see where there was any negligence on the part of the defendant.

But if a passenger assumes a position of danger at the invitation of a servant of the carrier, or under an express or implied representation that he may safely occupy the position, the carrier will, in general, be held liable for injuries resulting therefrom. 2 A. & E. Encyc. of Law, 766, and cases cited. In *Railroad v. Lee*, 50 N. J. L. 435 (10), the plaintiff in the trial court was invited by defendant's

1. *Burns v. Bellefontaine R'y Co.*, 50 Mo. 139, is reported in 4 Am. Neg. Cas. 477.

2. Reported with the *Pennsylvania* cases in Vol. 10 Am. Neg. Cas.

3. See note of this case with the *Massachusetts* cases in this volume, page 446, *ante*.

4. See note of this case with the *Massachusetts* cases in this volume, page 446, *ante*.

5. Reported with the *New York* cases in this volume, *post*.

6. *Fleck v. Union R'y Co.*, 134 Mass. 480, is reported in 3 Am. Neg. Cas. 801.

7. Note of this case with the *Michigan* cases, page 474, *ante*.

8. Reported with the *New York* cases in this volume, *post*.

9. Note of this case with the *Massachusetts* cases in this volume, page 446, *ante*.

10. Reported with the *New Jersey* cases in this volume, page 562, *post*.

agent to take an open horse car. The seats were full and he was obliged to take a place with others on a footboard running lengthwise with the car. He entered the car at a point where the company had but one track. When passing a point where there was a double track he was knocked off by a passenger standing on the footboard of a like car passing in the other direction. The plaintiff was a stranger to the road. It was held that if there was any question of contributory negligence, it was one for the jury and not the court.

In *Geitz v. Railroad*, 72 Wis. 307 (1), the plaintiff took passage on an open street railroad car. The seats were all occupied, and passengers were standing upon the footboards running from platform to platform. The plaintiff took a position upon one of these footboards, supporting himself by placing one arm around a post which supported the roof of the car. One of the rear posts of a like car going in the other direction struck him, throwing him to the ground. Says the court: "We cannot say it was negligence *per se* for the plaintiff to ride on the footboard. Whether his riding there was a negligent act was a proper question for the jury to determine in the light of all the facts in the case." The case of *Railroad v. Higgs*, 38 Kan. 375 (2), is quite like those just cited.

In *Willmott v. Railroad*, 106 Mo. 535 (3), the plaintiff, a boy, took a position on the lower step of the front platform of the car, holding onto a rod attached to the car. The driver received his fare. There was evidence tending to show that he was thrown from his place and injured by the negligence of the driver in whipping the mules. This court refused to say that the boy was, as a matter of law, guilty of contributory negligence, and in doing so treated him as an adult person.

We have said nothing more appearing than this, that the plaintiff took this position on the step with the gate between him and the platform, we should uphold the ruling sustaining the demurrer to the evidence. But what are the additional facts? Though this car was crowded with passengers, it stopped at Taylor avenue, and this was an invitation to plaintiff and others to get on, no contrary announcement being made or given. Indeed there is evidence tending to show that some ladies got on at that place. The plaintiff and

1. Reported with the *Wisconsin* cases in Vol. 10 Am. Neg. Cas.

2. Reported with the *Kansas* cases in this volume, p. 567, *ante*.

3. *Willmott v. Corrigan Consolidated Street R'y Co.*, 106 Mo. 535, is reported in 4 Am. Neg. Cas. 654.

Kelly took a position on this step to the front platform for want of room elsewhere, and this, too, with the knowledge of the driver. Having gone one or two blocks, they, by the driver's direction, took out the gate but could find no standing room on the platform. The driver then directed them to put the gate in place and stand on the outside, and this order they obeyed and were thus carried for a half mile before the accident.

In short the plaintiff was received as a passenger and was by the driver permitted and even directed to take this position on the step outside of the gate; and, applying the rule of the authorities cited, it cannot be said that the plaintiff was, as matter of law, guilty of contributory negligence.

A passenger has no right to take a position, even at the direction of the servant, which is obviously dangerous, and in such case the direction of the servant will be no excuse. Thus it was held, and properly held, in *Downey v. Hendrie*, 46 Mich. 498 (1), that it was negligence *per se* for a passenger of common sense to sit on the driving bar of a street car, though he did so at the invitation of the driver, there being room on the inside of the car. Standing on the step of a car cannot be said to fall within this principle. The danger of such a position is not so obvious that it can be said a reasonable man would disobey the invitation or direction.

2. The evidence of the plaintiff shows that he knew parties were constructing a sewer at Sarah street and that he had seen this derrick in the street when passing to and from his work. The defendant's track had been moved over towards the derrick on the morning of the day of this accident. There is nothing in these circumstances from which the court can say the plaintiff was, as a matter of law, guilty of contributory negligence in failing to see the derrick. Whether he was guilty of negligence in this respect was and is a question of fact for the jury. *Powers v. Boston*, 27 N. E. Rep. (Mass.) 995 (2), is in point. There is no room for any other conclusion as to this question.

3. There is also evidence tending to show negligence on the part of the defendant. The track was placed in this position near the derrick on the morning of the day of the accident, and the defendant must have known of its proximity to the cars. With such knowledge it became the duty of defendant to use all reasonable care to

1. Reported with the *Michigan* *Massachusetts* cases in this volume, cases in this volume, p. 473, *ante*. page 464, *ante*.

2. Note of this case with the
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avoid exposing passengers to danger, and especially is this so in view of the fact that passengers were allowed to stand on the side steps of the car. There is evidence of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff; but they are, in both cases, questions of fact for the jury. Certainly so as the case now stands.

4. The defendant pleads as a defense the ninth section of "an Act concerning street railroads in the city of St. Louis," approved January 16, 1860, which provides: "Said railroad companies shall not be liable for injuries to persons occasioned by their getting on or off the cars at the front or forward end of the car." This court said in *Muehlhausen v. Railroad*, 91 Mo. 347, "the Act of 1860 only exempts the company from liability for injury to any person sustaining such injury by *getting on or off* the front end of a car, but does not deny the right of a passenger to recover, who, through the negligence of a defendant company, was either thrown or caused to fall off such front end or platform." Surely the statute cannot and does not apply to a case like the one in hand, where the passenger at the time of the injury is not getting on or off but is riding on the steps of the platform with the knowledge and by the direction of the driver.

The judgment in this case is reversed and the cause remanded for further proceedings. All concur.

SULLIVAN V. JEFFERSON AVENUE RAILWAY COMPANY.

Supreme Court, Missouri, October Term, 1895.

[Reported in 133 Mo. 1.]

PASSENGER THROWING LIGHTED MATCH IN STREET CAR AND WOMAN'S DRESS CATCHING FIRE—RAILROAD NOT LIABLE.—Where plaintiff was injured by her dress catching fire while riding on one of defendant's street cars, a fellow passenger having thrown a lighted match which caught in plaintiff's dress, the railroad company was not liable, the accident not being due to any negligence on its part.

APPEAL from verdict and judgment for defendant in the St. Louis Circuit Court. The facts appear in the opinion. *Judgment affirmed.*

F. & ED. L. GOTTSCHALK, for appellant.

EDWARD S. ROBERT, for respondent.

Gantt, P. J.—The defendant is a street car company, operating its cars on Jefferson avenue in the city of St. Louis. On the 9th of

August, 1891, the plaintiff, a young lady, with a companion, another young lady, Miss Barrett, was a passenger on one of defendant's cars in charge of Henry Reid, the driver. The car was what is known as a bobtail horse summer car, and the driver fills the place of both conductor and driver. The plaintiff and her friend were sitting on the back seat and the car was moving north. As the car reached a point near the northern line of Washington avenue, which it crosses almost at right angles, Henry Voss, another passenger, sitting opposite plaintiff, lit a cigarette and attempted to throw the match out of the back door. Plaintiff was dressed in a light, gauzy summer dress, and in a moment after Voss threw the match, plaintiff's dress was discovered on fire. She screamed, as did the other ladies, four or five in number, and ran to the front door and told the driver she was afire. He immediately stopped his car. In the meantime the passengers had all left the car and plaintiff ran off screaming. Mr. J. F. Robinson, living at No. 700 Jefferson avenue, happened to be looking out of his window, and saw plaintiff's dress burning and with great presence of mind took a quilt and ran to her rescue and smothered the flames as she ran up the steps of a hospital near by. Her hands and arms and side were severely burned, so much so that her left hand was crippled and rendered useless.

She sues the company for the negligence of its driver, the *gravamen* of her complaint being contained in this allegation of her petition: "That said defendant's car was under the charge and control of its agent; that while this plaintiff was sitting in said car to be carried to the point of destination on Jefferson avenue, between Washington and Lucas avenue, her dress was set on fire on said car, and, the same threatening to burn her to death, she being then on fire, applied to said agent and driver in charge of and managing said car for protection and assistance, which protection and assistance said defendant was by law and by its undertaking bound and obliged to render and extend to her. But that said defendant, by its said agent and driver, refused to protect or assist her, but on the contrary said agent and driver rudely, wrongfully, and unlawfully pushed her away, and compelling her to jump from the car all on fire, as she then was. That the flames could easily have been extinguished at the time she applied to said driver for such protection and assistance, but by his refusal to do so and his acts in the premises, she was awfully burned, all about her body," etc.

The case was tried to a jury and a verdict returned for the defendant and judgment rendered accordingly.

To reverse the judgment plaintiff assigns two errors: First: in admitting in evidence an affidavit made by Miss Barrett, a witness for plaintiff, to contradict her evidence on trial; second: error in the instructions. Of these, in their order.

1. When this affidavit was offered, counsel waived all objections to it save that "the affidavit was taken by an agent of defendant without notice to plaintiff." *Russell v. Glasser*, 93 Mo. 353. The witness did not admit she had made the statement shown her in her affidavit. She intimated very plainly that her statement had not been written down as she gave it. Nothing less than an unequivocal admission that the witness made the very statement attributed to him or her will deprive the other party of proving the statement. *Peck v. Ritchey*, 66 Mo. 114. That a witness may be impeached by contradictory statements made out of court will not, certainly, be controverted at this late day. It is elemental; and surely the fact that the contradictory statement is under the solemnity of an oath does not lessen its value for impeachment.

The mere fact that the sworn statement was procured by an agent of the party offering it, does not affect its competency. If it be claimed that any fraud was perpetrated in suppressing a part of the statement, or that a statement is inserted which the witness insists he did not make, he is entitled to explain it, and the whole matter is left to the trier of fact, whether court or jury, to weigh the credibility of the witness; but it does not affect the admissibility of the statement. There is no merit in this assignment. *Bogie v. Nolan*, 96 Mo. 85, overruling *Priest v. Way*, 87 Mo. 16.

2. That the court erred in not instructing the jury as to the proper degree of care required of a carrier of passengers, we think is true. While not insurers, street car companies are carriers of passengers, and are held to that high degree of care that is demanded of other railways in carrying passengers, that is to say, the highest degree of practicable care and diligence which prudent men would observe in a like business, and under similar circumstances. *Jackson v. Grand Ave. R'y Co.*, 118 Mo. 199; *Clark v. R. R.*, 127 Mo. 197; *Waller v. R. R.*, 83 Mo. 608; *Furnish v. R. R.*, 102 Mo. 438.

But conceding this, how could the jury have reached a different conclusion. Plaintiff's counsel admit that the starting of the fire was in no manner attributable to any negligence on part of defendant. A fellow-passenger threw a lighted match into plaintiff's dress in an open summer car. Her dress was of the lightest material, and before defendant's driver knew anything of it, or by the exercise of

the highest degree of care could have anticipated such a misfortune, the unfortunate lady was enveloped in fire. What did prudence of the highest character demand? Evidently the first step was to stop the car. This Miss Barrett, plaintiff's own witness, says the driver did, *immediately*, and she is corroborated by all the other witnesses as to this. What next? Plainly to aid the unfortunate young lady by assisting in using any and all appropriate means at hand to extinguish the fire. There is not a *scintilla* of evidence that the driver had any appliance suitable for such a purpose. Nor could it be expected that the proprietor of this horse car on a summer day would have anticipated that one of its passengers would be burned in this way. The most prudent man would never have thought of such an accident, nor have furnished such a car in such weather with fire extinguishers. The car was only twelve feet long and the moment the plaintiff found she could not escape through the front door she ran out the rear door.

The evidence of the driver, who had died in the meantime, was preserved in a deposition, and he testified he burnt his hands in the effort to assist plaintiff; that he called to Voss, who dropped the match, "to pull her dress off of her."

Considering the rapidity with which her dress burned, the circumstances under which it was ignited, and the promptness of the driver in stopping the car; the escape of plaintiff from the car by the rear door before the driver could possibly reach her, after halting his team, it must be ruled that this deplorable accident was in no manner the result of any negligence or wrong on the part of defendant or its servant, but was wholly attributable to the party who carelessly threw the match into the inflammable material of which plaintiff's dress was made, and there is no evidence showing that the driver could have averted the damages had he reached her before Mr. Robinson did.

It is due to the driver to say that the allegations that he forced her off the car and treated plaintiff brutally were not supported by the evidence nor credited by the jury, and plaintiff's evidence of his swearing at her or pushing her can well be attributed to her very great excitement at the time.

The verdict of the jury was for the right party, notwithstanding the errors in the instructions, and the judgment will not be reversed under such circumstances.

Judgment affirmed.

SHERWOOD and BURGESS, J. J., concurred, SHERWOOD, J., delivering a separate opinion.

NOTE OF MISSOURI CASES RELATING TO PERSONS INJURED AT STATIONS.

Injured at Station—Contributory Negligence:

WHALEN *v.* ST. LOUIS, ETC., R. R. Co., 60 Mo. 323 (1875), action for damages for person injured at station, holding that where burden of proof rests upon plaintiff the question of contributory negligence is not for the jury if the facts and inferences reasonably drawn from the evidence point as much to plaintiff's negligence as to its absence, or if the facts do not justify any inference as to the same.

Infant Trespasser Struck by Train:

HICKS *v.* PACIFIC R. R. Co., 64 Mo. 430 (1877), action for injury to a child injured while trespassing at station, holding that a child is held to such a degree of care only as is reasonably expected from children of his age. Railroad held liable where plaintiff was struck by a side brake of a construction train, plaintiff being in a position where he would not have been struck by an ordinary train.

Person not Passenger:

In LANGAN *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'y Co., 72 Mo. 392 (1880), plaintiff, who had gone to defendant's station to assist a friend to board a train, was struck by the bumper of an engine as he was walking along the platform, injuries resulting in the loss of both of his legs. On the trial plaintiff recovered judgment for \$5,000, which was reversed by the St. Louis Court of Appeals, but, on appeal to the Supreme Court, the judgment in the Appellate Court was reversed, and judgment for plaintiff in the Circuit Court affirmed. The court held that the facts warranted the submission of the question of defendant's negligence to the jury.

Backing Train:

In HENRY *v.* ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY Co., 76 Mo. 288 (1882), the facts were as follows: Where a passenger was told in the night time to change cars at a station, and entered a car of the train he was to ride on, but was ordered out by one of the company's employees, who said the train was not ready, and, after remaining a short time on the car platform, the passenger alighted, and while standing behind a car on a track near the one upon which the car he had alighted from was, was injured by a train backing against the car behind which he stood, the expulsion of the passenger by the employee was not the proximate cause of the injury, and the company was not liable. Judgment for plaintiff reversed.

Falling from Elevated Station Platform:

In EVANS *v.* INTERSTATE RAPID TRANSIT RAILWAY Co., 106 Mo. 594 (1891), plaintiff's husband was killed by falling from elevated station platform to the street, as he was trying to get on one of defendant's trains. Judgment reversed on the ground of erroneous

instruction that it was the duty of jury in considering whether train was held sufficient time for deceased to get on, to also consider whether the railing on platform was reasonably safe, as from the evidence it was manifest that the want of it had no agency in causing the death of plaintiff's intestate.

Injured by Mail Bags:

In **JAMES v. MISSOURI PACIFIC R'y Co.**, 107 Mo. 480 (1891), plaintiff, a hotel keeper, had gone to defendant's station to see some guests off, and also to mail letters. While looking for the mail coach, he was struck by a mail pouch thrown out of the car by the mail agent, and his knee was injured. Plaintiff was familiar with the locality, and the practice of throwing out mail bags. When struck, his foot caught in a hole on the platform, one of several auger holes in the lumber used in the construction of the platform. On the trial plaintiff recovered \$8,000 damages. On appeal by defendant judgment was reversed for erroneous instruction that it is negligence to permit a hole to remain in station platform, as it was for the jury to determine whether the hole was dangerous or not, and whether defendant failed to exercise proper care. It was also held that the instructions given on the trial, were, on the whole, misleading.

In **SARGENT v. ST. LOUIS & SAN FRANCISCO R'y Co.**, 114 Mo. 348 (1892), plaintiff, while leaving defendant's station, fell over some mail bags on station platform and was injured. Judgment for plaintiff reversed on the ground of contradictory instruction as to duty of plaintiff to exercise due care, and the question of whether due care was exercised was for the jury to determine.

Obstruction on Platform:

In **HENDRICK v. CHICAGO & ALTON R. R. Co.**, 136 Mo. 548 (1896), plaintiff, after alighting from train, started to cross to the opposite side of the depot to see the engineer on private business and was injured by striking against box on baggage car platform. Held, not entitled to recover damages.

NOTE OF MISSOURI CASES RELATING TO PERSONS INJURED ON TRAINS, ETC.

Among other cases as to Injuries on Trains, etc., are the following:

Bridge Destroyed by Public Enemy—Train Wrecked:

In **SAWYER v. HANNIBAL & ST. JOSEPH R. R. Co.**, 37 Mo. 240 (1866), it was held that a carrier was not liable to a passenger injured on its train where the train, without fault on the part of the carrier, was thrown into a chasm, owing to the bridge which spanned the same having been destroyed by an armed force of public enemy.

Unusual Storm—Train Derailed:

ELLETT v. ST. LOUIS, KANSAS CITY & NORTHERN R. R. Co., 76 Mo. 518 (1882), holding that where an accident occurs through a

storm of unusual force, railroad may be liable for neglect to examine track before continuing to use same, where risk was known to be great. Defendant's train was wrecked, owing to a storm carrying away embankment, and the railway company was held liable for injuries sustained by plaintiff in consequence thereof.

Stealing a Ride:

In *BARNEY v. HANNIBAL & ST. JOSEPH R. R. Co.*, 126 Mo. 372 (1895), it was held that a railway company is not liable for an injury to a child six years of age, who, for the purpose of stealing a ride, and unknown to the employees, took hold of the lower rung of a ladder on the side of one of the freight cars of a train as it was entering the yard of the company, and while in that position his foot slipped under the wheels and it was run over, as there was no duty imposed upon the company to see that trespassers did not jump upon its moving cars. *Held, also*, that there is no obligation upon a railroad company to fence its yards in a city or town. Section 3927, Rev. Stats. 1889, making it a misdemeanor for "any person, minor or adult, to climb upon, hold to, or in any manner attach himself to any locomotive engine or car, while the same is in motion, or running into or through any city or town in this State," is applicable to a child of very tender years, and no recovery can be had in an action for an injury to the child who was violating the statute. There being no duty imposed upon the company to keep boys out of the yard, the fact that the employees were instructed to keep the boys out did not make the company liable when the employees neglected to obey the instructions.

Arm Out of Window of Car:

In *WINTERS v. HANNIBAL & ST. JOSEPH R. R. Co.*, 39 Mo. 468 (1866), where plaintiff was injured by arm being out of window of car. *Held* that arm resting *inside* window sill not contributory negligence.

Stage Coach:

COOVER v. MOORE, 31 Mo. 574 (1862), and *KENNEDY v. BURIER*, 36 Mo. 128 (1865), were actions brought under the Missouri Statute of damages, R. C. 647, §2, for negligent killing of plaintiffs' intestates while passengers upon defendants' stage coaches. The questions in each case turned upon the statutory right of recovery of next of kin.

Falling Object on Train:

In *OCH, et al. v. MISSOURI, KANSAS & TEXAS R'y Co.*, 130 Mo. 27 (1895), plaintiff was injured by being struck on the head by the falling of a ventilating window from the car of defendant's train on which she was a passenger, due to alleged careless and defective condition of the window. The plaintiff was pregnant at the time, and the shock from the injury caused a miscarriage and subsequently an operation had to be performed upon her. There was a judgment for plaintiff for \$7,521.45, from which defendant appealed.

The Supreme Court reversed the judgment on the ground among others, that it was error to try the issue of fraud in securing release, the release pleaded being a bar to cause of action stated in the petition until rescinded. The court fully discussed the authorities bearing on the question of release.

Falling from Open Street Car:

In *HITE v. METROPOLITAN STREET R'y Co.*, 130 Mo. 132 (1895), plaintiff was injured by being thrown from an open street car of defendant's on which she was a passenger, as the car was rounding a curve, due to alleged running of car "at a careless and rapid rate of speed and with a jerk." On the trial she recovered judgment for \$4,950. Defendant appealed. The Supreme Court reversed the judgment, holding that the evidence showed the injury to the plaintiff was the result of an accident, for which defendant was not liable. Plaintiff's motion for rehearing overruled.

Defective Car:

SHARP v. KANSAS CITY CABLE RAILWAY Co., 114 Mo. 94 (1893), an action for damages for injuries to passenger sustained by reason of defective car. Judgment for defendant reversed for erroneous instructions given in the trial.

Persons not Free Passengers:

TIBLEY v. MISSOURI PACIFIC R'y Co., 82 Mo. 292 (1884), holding stockman, travelling in charge of stock, is not a free passenger.

MAGOFFIN v. MISSOURI PACIFIC R'y Co., 102 Mo. 540 (1890), mail agent not a free passenger.

MELLOR v. MISSOURI PACIFIC R'y Co., 105 Mo. 455 (1891), mail agent in charge of mail not a free passenger.

JONES v. ST. LOUIS, ETC., R. R. Co., 125 Mo. 666 (1894), porter in a parlor car not a free passenger.

SLEIGH UPSET AND PASSENGER INJURED—EVIDENCE—STAGE COACH PROPRIETORS—NONSUIT REVERSED.—In *Ryan v. Gilmer*, 2 Mont. 517 (1877), plaintiffs, husband and wife, brought action for damages for injuries sustained by the wife by the overturning of a sleigh or "bobsled," belonging to defendants and on which plaintiff was a passenger. At the trial plaintiff was nonsuited and from this judgment appealed. The Supreme Court reviewed the case at length, and in stating the case said: "It appears that the appellants had been conveyed in a coach from Watson to a point which is south of Beavertown, where the sleigh or 'bobsled' was furnished by the respondents for the purpose of transporting the appellants and express matter and mail sacks. When the accident took place the parties were travelling upon a good level road at the rate of about five or six miles per hour, and the snow on the ground made fine sleighing. The horses were strong and under the control of the respondents' driver, and were

stopped immediately, without any difficulty, and the sled did not run out of the road or track. The appellants know of no cause for the upsetting of the sleigh, although Mr. Ryan, one of the appellants, made a careful examination at the time for the purpose of discovering it. Upon this subject, the evidence does not enlighten us." After citing many authorities the court (per BLAKE, J.) concluded: "It follows that there was evidence relating to the alleged negligence of the respondents, which should have been submitted to the jury. The court erred in assuming that the testimony did not have a tendency to prove that there was a want of due and reasonable care on the part of the respondents. The authorities which have been cited refer to the upsetting or overturning of a coach or wagon (1). The respondents used voluntarily a sleigh or 'bobsled' upon a portion of the route between Watson and Helena, and allege in their answer that this means of conveyance was the most convenient and suitable at the place where the accident occurred. There is nothing in the character of this vehicle which modifies the rules of law that have been referred to." Judgment reversed and new trial granted. WADE, CH. J., dissented in a separate opinion. [Among the authorities cited by Blake, J., in his opinion were: *Fairchild v. California Stage Co.*, 13 Cal. 605; *Ingalls v. Bills*, 9 Metc. (Mass.) 1; *Stokes v. Saltonstall*, 13 Pet. 181, 7 Am. Neg. Cas. 297; *Boyce v. California Stage Co.*, 25 Cal. 460; *Yeomans v. California Stage Co.*, 44 Cal. 84; *Feital v. Middlesex R. Co.*, 109 Mass. 405; *Stockton v. Frey*, 4 Gill (Md.) 406, which cases will be found reported under their respective States in this volume].

SPELLMAN v. LINCOLN RAPID TRANSIT COMPANY.

Supreme Court, Nebraska, January Term, 1893.

[Reported in 36 Neb. 890.]

STREET RAILWAY COMPANIES COMMON CARRIERS.—Street railway companies are common carriers of passengers, and are liable as other common carriers upon common law principles.

1. *HIGLEY v. GILMER* et al., 3 Mont. 90 (1878), was an action for damages for injuries sustained by a passenger by the upsetting of a stage coach. From judgment for plaintiff defendants appealed and the same was reversed on the ground that the case was tried upon the theory that it made no difference as to whether plaintiff was a passenger or a trespasser in regard to defendants' liability and for this reason it was error

to strike out a portion of defendants' answer.

In *SCHAFER v. GILMER* et al., 13 Nev. 330 (1878), an action for damages for injuries sustained by the upsetting of a stage coach, judgment for plaintiff for \$5,000 was affirmed. The question of plaintiff's contributory negligence not being raised in the pleadings, and no evidence being offered, there was nothing to authorize its consideration by the jury.

DUTY OF CARRIERS.—Common carriers, for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence and human foresight, and are liable for the slightest negligence.

DERAILMENT OF CAR—PRESUMPTION OF NEGLIGENCE.—Where a street railway car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption.

DERAILMENT OF STREET CAR—BURDEN OF PROOF.—Where a passenger, without negligence on his part, is injured by the derailment of the car in which he is travelling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented.

ERROR from the District Court of Lancaster County. The facts appear in the opinion. *Judgment reversed.*

CHARLES A. BURKE and **STEARNS & STRODE**, for plaintiff in error

WEBSTER, ROSE & FISHERDICK, for defendant in error.

Ragan, C.—Thomas Spellman brought suit in the District Court of Lancaster county, Nebraska, against the Lincoln Rapid Transit Company, alleging that it was a corporation owning and operating a street railroad in the city of Lincoln, and that on the 23rd of May, 1890, while he, Spellman, was a passenger upon one of the transit company's cars, the defendant, its agents and servants, so negligently and carelessly used, managed and controlled the said car and the engine by which it was drawn, and so negligently and carelessly managed, used, looked after, and repaired said road and the tracks and switches connected therewith, that the car in which the plaintiff was carried, and the engine drawing the same, were allowed to run off the track; that in consequence of the car running off the track plaintiff was thrown with great force and violence against the seat and the railing thereof in front of him, and then back on the seat and edges thereof behind him, and was thereby permanently injured, and that the plaintiff was careful and did not contribute to the injury in any degree whatever, and prayed for damages against the transit company.

The answer of the defendant denied all negligence of itself or servants; admitted that the car was derailed as claimed by the plaintiff; denied that the plaintiff's injuries were permanent, and alleged that the plaintiff was suffering from a rupture of old and long

standing. To this there was a reply, consisting of a general denial, by the plaintiff.

There was a trial to a jury and a verdict for the transit company, and Spellman brings the case here on error.

On the trial it was admitted that the transit company was a corporation and engaged in the carrying of passengers for hire. There was no pleading or proof that Spellman was guilty of any contributory negligence whatever. The motive power of the cars was a dummy steam engine. The evidence in the record does not afford any precise explanation for the cause of the car's leaving the track.

The trial judge, at the request of the transit company, gave the jury the following instruction:

"While it is the duty of the defendant, as a carrier of passengers, to exercise proper care for their safety, yet the defendant is not an insurer of the safety of its passengers and not liable to them for injuries resulting from such defects in its means of transportation as could not have been guarded against by the exercise of care on its part, and which are not due in any way to negligence on its part."

"The test of negligence in such cases is whether the defects ought to have been observed practically and by the use of ordinary and reasonable care."

The giving of this instruction is here assigned for error. It will be observed that the test submitted by the learned judge to the jury was whether the transit company used ordinary and reasonable care. The defendant in error was a common carrier of passengers for hire, and the question to be determined in passing upon the correctness of this instruction is, what degree of care is due from a common carrier of passengers to its passengers?

In Rorer, Railroads, vol. 2, page 1434, it is said: "For injuries occasioned by negligence, street railways are liable, as others are, upon common law principles, and no more so." And on page 1436, the same authority says: "The company is bound to the highest degree of care and utmost diligence to prevent their (passengers) injury." To the same effect, see Shearm. & Redf., Neg., sec. 226.

In *Smith v. St. Paul City Street R. Co.*, 32 Minn. 1 (1), the court say: "Street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence."

1. *Smith v. St. Paul City Street R. Co.*, 32 Minn. 1, is reported in 4 Am. Neg. Cas. 220.

In *Sales v. Western Stage Coach Co.*, 4 Iowa, 546 (1), the rule is thus laid down: "Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants." See also *Bonce v. Dubuque Street R. Co.*, 5 N. W. Rep. (Iowa) 177 (2).

In *Derwort v. Loomer*, 21 Conn. 245 (3), the Supreme Court of that State laid down the rule thus: "In the case of common carriers of passengers, the highest degree of care which a reasonable man would use is required by law."

This is also the doctrine of the Supreme Court of California. See *Wheaton v. North Beach & M. R. Co.*, 36 Cal. 590 (4), where it is said: "Passenger carriers, by their contract, bind themselves to carry safely those whom they take into their coaches or cars, as far as human foresight will go; that is, for the utmost care and diligence of very cautious persons."

This is also the rule in New York. See *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378 (5), where it is said: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons." See also *Carroll v. Staten Island R. Co.*, 58 N. Y. 126 (6).

This is also the doctrine of the Supreme Court of Colorado. See *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col. 1 (7).

This is the doctrine of the Supreme Court of the United States. In *Phila. & R. R. Co. v. Derby*, 14 How. (U. S.) 485, it is said: "When carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." This doctrine is reaffirmed by the same court in *Steamboat New World v. King*, 16 How. (U. S.) 469. See these cases cited and approved in *Ind. & St. L. R. Co. v. Horst*, 93 U. S. 291 (8), where the court say, in reviewing the cases cited above: "We desire to reaffirm the

1. Reported in this volume, page 321, *ante*.

2. *Bonce v. Dubuque Street R. Co.*, 53 Iowa, 278, is reported in 3 Am. Neg. Cas. 347.

3. Reported in this volume, page 142, *ante*.

4. *Wheaton v. North Beach & M. R. Co.*, 36 Cal. 590, is reported in 2 Am. Neg. Cas. 164.

5. *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378, is reported in 5 Am. Neg. Cas. 93.

6. Reported with the New York cases in this volume, *post*.

7. Reported in this volume, page 115, *ante*. See also note on page 123.

8. *Ind. & St. L. R. Co. v. Horst*, 93 U. S. 291, is reported in 7 Am. Neg. Cas. 331.

doctrine, not only as resting on public policy, but on sound principles of law." They also cite *N. Y. Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, and quote and affirm that case as saying: "The highest degree of carefulness and diligence is expressly exacted." Continuing, the court say: "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business; but it does emphatically require everything necessary to the security of the passenger, and reasonably consistent with the business of the carrier and the means of conveyance employed.

"The rule, as gathered from the foregoing authorities, requires that a common carrier of passengers shall exercise more than ordinary care; it requires the exercise of extraordinary care; the exercise of the utmost skill, diligence, and human foresight; and makes the carrier liable for the slightest negligence."

It follows from the foregoing that the giving of the instruction complained of was error.

Spellman also assigns as error the giving by the court below, at the request of the transit company, instructions Nos. 2 and 3. They are as follows:

"2. If the jury find from the evidence that the defendant constructed and laid its track in a proper manner, and had the same made safe and in good condition at the place of the accident complained of before it was put into use, and from time to time since, at reasonably short intervals, had the same inspected and repaired by competent track men, specially employed for that purpose, and that the car upon which the plaintiff was riding at the time of the accident was derailed without any fault or neglect of the person or persons in charge thereof for defendant, and the same is not shown to have been caused by any defect in said road or car, then the plaintiff could not recover for any injuries caused thereby, and the jury should find for the defendant.

"3. Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engines or cars, or negligence on the part of defendant's employees in operating the

same, and could have been avoided by exercise of proper care in inspection and repair and operation, then the jury will find for the defendant. The mere fact that the defendant's car left the track and that plaintiff thereby sustained injury, is not sufficient to sustain a verdict for the plaintiff. To find a verdict for the plaintiff the jury must find that the defendant was in some way negligent in the care of its track or the running of its train, and the accident was caused by such negligence."

We shall consider these two instructions together. The court, in effect, told the jury by these instructions that, though Spellman might have been injured by the derailing of the car, that fact did not raise a presumption of negligence against the transit company; and further, it put the burden on Spellman of proving the particular cause of the derailment of the car.

In Rorer, Railroads, vol. 2, page 1434, it is said: "In actions against * * * (street railways) for personal injuries caused by the cars leaving the track, the burden of proof is on the company to show that there was no fault or want of care on its part." See the same doctrine in Patterson's Railway Company Accident Law, sec. 439.

The Supreme Court of the United States in *Stokes v. Saltonstall*, 38 U. S. 181, decided: "In an action against the owner of a stage coach used for carrying passengers for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage. * * * The fact that the carriage was upset * * * is *prima facie* evidence that there was carelessness or negligence or want of skill upon the part of the driver, and casts upon the defendant the burden of proving that the injury was not occasioned by the driver's fault." This case was affirmed by the same court in *New Jersey R. Co. v. Pollard*, 22 Wall. (U. S.). 341 (1).

In *Cleveland, C., C. & I. R. Co. v. Walrath*, 38 Ohio St., 461 (2), the Supreme Court of Ohio thus announces the rule: "On proof of injury sustained by a passenger on a railroad train by the falling of a berth in a sleeping car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad

1. *New Jersey R. Co. v. Pollard*,
22 Wall. 341, is reported in 7 Am.
Neg. Cas. 325.

2. Reported with the Ohio
cases in Vol. 10 Am. Neg. Cas.

company is liable;" citing and affirming *Iron R. Co. v. Mowery*, 36 Ohio St. 418 (1).

The Supreme Court of Colorado in *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col. 1, adopted the rule in this language: "If a passenger is killed in consequence of the overturning of a car, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted."

The Supreme Court of Minnesota in *Smith v. St. Paul C. R. Co.*, 32 Minn. 1, formulates the rule as follows: "Where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of the plaintiff's case."

In the course of the opinion the learned judge who delivered it said: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can effect such result. From the application of this strict rule to carriers, it naturally follows that where an injury occurs to a passenger through a defect in the construction, or working, or management of the vehicle, or anything pertaining to the service, which the carrier ought to control, a presumption of negligence arises. The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of the accident, which he might be interested to withhold, and might himself be unable to prove."

Such is the doctrine of the Supreme Court of Illinois as expressed by that court in *Peoria, P. & J. R. Co. v. Reynolds*, 88 Ill. 418 (2), where it is said: "Where a railway car is thrown from the track whereby a passenger for hire is injured, the presumption is that the

1. *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418, is reported in 6 Am. Neg. Cas. 176.

2. Reported in this volume, page 226, *ante*.

accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the burden is on the company to show it was not negligent in any respect." This is also the rule in Indiana. See *Pittsb., C. & St. L. R. Co. v. Williams*, 74 Ind. 462 (1). It is also the rule in New York. See *Seybolt, Adm'x, v. New York, L. E. & W. R. Co.*, 95 N. Y. 562 (2).

In *Feital v. Middlesex R. Co.*, 109 Mass. 398 (3), the action was against a street railway company for injuries resulting to plaintiff from an accident that happened while she was travelling in one of the defendant's cars. The plaintiff, to prove her case against the street car company, called the conductor and the driver of the car as witnesses, and they testified that the car ran off the track, one wheel inside and one outside of the track; that they with others left the car in question; that there was no defect in the car, the wheels, or the track; that the car was going about five miles an hour; that when they lifted the fore wheels on the track, everything was right, and the car went on; that the cars went over this place just before and just afterwards without trouble, and they did not know what made the car run off.

At the close of plaintiff's case defendant requested a ruling that the plaintiff could not recover, because she had failed to show negligence on the part of the street railway company. This motion was overruled. The railway company then introduced evidence that the road where the accident occurred had been gone over by their superintendent the day before the accident, and that there was no defect in it; that the day after the accident he saw the place where it occurred, and that there was nothing the matter with the road then and had not been since. The railway company then requested the court to instruct the jury as follows:

"The plaintiff received her accident from the fact of the car's running off the track while travelling at a moderate rate. There is no evidence that the car was out of order. It is not claimed that the driver did anything wrong, or that the rails were before, or then, or afterwards out of order. * * * Under these circumstances the plaintiff cannot recover. That there was no evidence of any negligence on the part of the railway company. That the burden of proof is upon the plaintiff to show how the accident happened, and what was the particular negligence that caused the same; and that,

1. Note of this case on page 289, *ante.* cases in this volume, *post.*
 2. Reported with the New York *ante.*
 3. Note of this case on page 447
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unless the plaintiffs had done so they could not recover."

The trial court refused to so instruct, and this refusal was assigned as error. On appeal to the Supreme Court it said: "On the trial of an action against a street railway corporation for injuring a passenger, proof that the injury was caused by a car's running off the track at a place where the track and the car were under the exclusive control of the defendants is sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault."

In the light of the foregoing authorities the court erred in giving the instructions complained of.

In our review of this case we have not been unmindful of the suggestion of the counsel for defendant in error that the trial court cured instruction No. 3 complained of by instructing the jury of his own motion: "A train of cars, similar to that operated by the defendant, is presumed to stay upon the track, and if such train should, for any reason, leave the track, the presumption is that it left the track through some fault of the defendant." It is not necessary to determine now whether this construction conflicted with the ones complained of, nor whether one cured the other. The greatest difficulty with the instruction complained of lies in this: "Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engine, or cars, or negligence on the part of the defendant's employees in operating the same, and could have been avoided by the exercise of proper care in inspection, repairing, and operation, then the jury will find for the defendant." Here the jury were told in effect that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by anyone, nor is there a word of evidence, that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him. This was enough. The burden was then on the carrier to rebut this presumption of negligence by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented.

The judgment of the District Court is reversed, and the cause remanded with instructions to the court below to grant the plaintiff in error a new trial. Reversed and remanded. All concur.

PASSENGER ON FOOTBOARD OF OPEN STREET CAR THROWN OFF BY SUDDEN JERK—EVIDENCE—NEGLIGENCE — INSTRUCTIONS—PRACTICE—JURORS.—In an action to recover damages for injuries to a passenger sustained while standing on footboard of open street car, preparatory to alighting therefrom, due to alleged sudden jerk of car, plaintiff recovered judgment, from which defendant appealed. The Supreme Court reviewed the case at length, the points decided being stated in the syllabus as follows:

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one for the court. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, and authorities in support of this rule, collated in opinion, followed (1).

1. "This is the settled rule and doctrine of this court, and has been many times announced, as will be seen from the following cases: *Huff v. Ames*, 16 Neb. 139; *Johnson v. Missouri P. R. Co.*, 18 Neb. 690; *City of Lincoln v. Gillilan*, 18 Neb. 114; *City of Plattsmouth v. Mitchell*, 20 Neb. 228; *Powers v. Craig*, 22 Neb. 621; *Orleans Village v. Perry*, 24 Neb. 831; *Union P. R. Co. v. Lee Sue*, 25 Neb. 772; *Stevens v. Howe*, 28 Neb. 547; *Omaha & R. V. R. Co. v. Clark*, 35 Neb. 867; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 4 Am. Neg. Cas. 849; *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27; *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 4 Am. Neg. Cas. 874; *American Water Works Co. v. Dougherty*, 37 Neb. 373; *Union P. R. Co. v. Porter*, 38 Neb. 226, 4 Am. Neg. Cas. 875. The rule is, we think, just and reasonable, and in harmony with the genius of our institutions and the weight of modern judicial authority. *Louisville & N. R. Co. v. Crunk*, 21

N. E. Rep. (Ind.) 31, 3 Am. Neg. Cas. 229; *New York, P. & N. R. Co. v. Coulbourn*, 16 Atl. Rep. (Md.) 208, 3 Am. Neg. Cas. 700; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53, 3 Am. Neg. Cas. 648; *Britton v. Street R. Co., Grand Rapids*, 51 N. W. Rep. (Mich.) 276, 4 Am. Neg. Cas. 123; *Lacas v. Detroit City R.*, 52 N. W. Rep. (Mich.) 745, 4 Am. Neg. Cas. 138; *Strand v. Chicago & W. M. R. Co.*, 31 N. W. Rep. (Mich.) 184, 4 Am. Neg. Cas. 70; *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa 150; *Bowie v. Greenville Street R. Co.*, 10 So. Rep. (Miss.) 574, 4 Am. Neg. Cas. 317; *Ridenhour v. Kansas City Cable R. Co.*, 13 S. W. Rep. (Mo.) 889, 4 Am. Neg. Cas. 644; *Buck v. People's Street R.*, 8 S. W. Rep. (Mo.) 1090, 4 Am. Neg. Cas. 691; *Lent v. N. Y. Central & H. R. R. Co.*, 24 N. E. Rep. (N. Y.) 653, 5 Am. Neg. Cas. 315; *Central Passenger R. Co. v. Stevens*, 22 S. W. Rep. (Ky.) 312; *Connolly v. City of Waltham*, 31 N. E. Rep. (Mass.)

"Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case.

"Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.

"Plaintiff sued the defendant, a street railway company, for damages for injuries she alleged she sustained through the negligence of defendant's servants while a passenger on its cars. The car on which plaintiff rode was an open one, having seats crosswise, and on either side a platform on which persons stepped in entering or leaving the car. At the end of each seat was an upright provided with a hand-hold. Plaintiff testified that on entering the car she informed the conductor that she wished to alight at Cass street, to which he answered, 'Yes, ma'am'; that when the car reached Cass street crossing she rang the bell, the gripman applied the brake and brought the car almost to a standstill; that thinking it would stop every instant, without using the hand-hold, she stepped onto the platform, preparatory to stepping onto the street, when the car came to a full stop, and while in that position and seen by the gripman, he released the brake and suddenly accelerated the car's speed with a jerk, which threw plaintiff onto the street. *Held*, 1, whether plaintiff was guilty of contributory negligence in stepping onto the platform of the car while in motion, and in not using the hand-holds on the uprights, were questions of fact for the jury; 2, that the jury's finding that plaintiff was thrown from the platform by the cause and in the manner she testified, would not be set aside as not supported by the evidence because two witnesses testified that she stepped from the platform onto the street, nor because two witnesses swore there was no sudden acceleration of the speed of the car, and three witnesses swore that they did not observe any (1).

302; *Finnegan v. Fall River Gas Works Co.*, 34 N. E. Rep. (Mass.) 523; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 7 Am. Neg. Cas. 359; *Hobbs v. Chicago Sugar Refining Co.*, 44 Ill. App. 418; *Arkansas Telephone Co. v. Ratteree*, 21 S. W. Rep. (Ark.) 1050; *Brown v. Brooks*, 55 N. W. Rep. (Wis.) 395; *Thompson v. Flint & P. M. R. Co.*, 57 Mich. 300; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208; *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654; *Jamison v. San Jose & St. C. R. Co.*, 55 Cal. 593. This rule has received the sanction of the Supreme Court of the United States. *The Grand Trunk R. Co. v. Ives*, 144 U. S. 408."

1. *Killed after alighting from*

street car.—*OMAHA STREET R'y Co. v. LOHNEISEN*, Adm'x, 40 Neb. 37 (1894), was an action for damages for death of plaintiff's intestate, who after alighting from front platform of street car, was struck and killed by a car on parallel track. There was judgment for plaintiff from which defendant appealed. The Supreme Court in reviewing the case held that it is the settled rule in this State that where different minds may reasonably draw different inferences from the same state of facts as to whether such facts establish negligence or contributory negligence, the question of negligence must be left to the jury. Judgment affirmed.

"This court will not weigh conflicting evidence nor pass judgment upon the credibility of witnesses.

"Such expressions as 'slight negligence' and 'slight want of ordinary care' should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language.

"To qualify a person to act as a juror he should not only be unbiased and unprejudiced against all parties to the suit, but he should stand indifferent as to the success of either party thereto; and a person called as a juror who testifies that his acquaintance with one of the parties will interfere with his judgment and finding in the case should be excused." Judgment affirmed. Opinion by RAGAN, C. JOHN L. WEBSTER appeared for plaintiff in error; COWIN & McHUGH, for defendant in error. *Supreme Court, Nebraska, January Term, 1894. Omaha Street Railway Co. v. Craig*, 39 Neb. 601.

BOY FALLING FROM STEPS OF STREET CAR—EVIDENCE—NEGLIGENCE—DIRECTING VERDICT—ERROR.—In an action to recover damages for injuries sustained by a boy falling from steps of street car plaintiff was nonsuited, but on appeal judgment was reversed. The facts and points are stated in the syllabus as follows:

"It is not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of persons in charge thereof.

"It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars.

"A person standing on the steps of a moving street car, being unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train.

"Street railway companies in this State are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injuries to passengers.

"The plaintiff, a lad of fourteen years of age, boarded the defendant's train at South Omaha, bound for the city of Omaha. When he reached the train, which was waiting at the terminus of the line, it was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made four blocks distant he stepped off the train to assist a fellow passenger to alight and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately and secured standing room on the front step of the trailer, holding on to the dash board and to the iron rail attached to the car, for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to

relinquish his hold, and fell, receiving the injuries complained of. There was evidence tending to prove that the pressure which forced him off the train was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. *Held*, that the question of negligence was for the jury, and that it was error to direct a verdict for the defendant." Judgment reversed. Opinion by POST, J. JOHN O. YBISER appeared for plaintiff in error; JOHN L. WEBSTER, for defendant in error. *Supreme Court, Nebraska, January Term, 1895. Pray v. Omaha Street Railway Co.*, 44 Neb. 167.

JUMPING FROM MOVING TRAIN TO AVOID DANGER—MENTAL AND BODILY SUFFERING—DAMAGES.—

The plaintiff jumped from a moving train in order to escape a threatened collision with a runaway freight car due to the negligence of the defendant. In jumping she severely injured her left ankle and was unable to sleep on account of pain for seventy hours, was confined to her bed three weeks, and unable to walk without the assistance of crutches for five months. A surgeon who examined the injured limb the following day testified that from the crepitus or grating sound observable on moving and pressing upon the ankle there was an evident fracture of the astragalus or ankle bone. At the time of the trial three years later her ankle was still enlarged and extremely sensitive, with partial ankylosis or permanent stiffness of the joint, and evidence tending to prove that such condition, including present lameness, would be of long duration and probably permanent. *Held*, that a verdict of \$3,000 is not excessive. On the question of damages the court said that mental or bodily anguish is incapable of measurement by any fixed and arbitrary rule, but from its nature must depend largely upon the judgment of the jury, based upon the circumstances of the particular case. Judgment for plaintiff for \$3,000, rendered in the District Court for Clay County, affirmed. *Supreme Court, Nebraska, January Term, 1895. St. Joseph and Grand Island Railroad Company v. Hedge*, 44 Neb. 448.

STOCKMAN INJURED—ERRONEOUS INSTRUCTION AS TO PASSENGER.—A shipper of cattle, who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire, and an instruction to the contrary effect was erroneous.

DROVER'S PASS—CONDITIONS.—One who ships cattle and undertakes, upon a pass given him for that purpose, to accompany and care for his stock in transit does so under the implied conditions that he will submit to whatever inconveniences are necessarily incident to his undertaking.

NEGLIGENCE FOR JURY.—In an action for damages for injuries inflicted by an engine upon a shipper of live stock, who was

accompanying and caring for such stock under the arrangement above indicated, the question of the existence of negligence, such as would give rise to a cause of action, or of such contributory negligence as would defeat it, is one of fact to be determined by the jury. Judgment for plaintiff for \$5,000 in the District Court of Valley County reversed. *Supreme Court, Nebraska, January Term, 1896. Omaha and Republican Valley Railway Company v. Crow*, 47 Neb. 84.

STOCKMAN INJURED—FREE PASS—RAILROAD LIABILITY.—A shipper of live stock who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained, by reason of the negligence of its employees, is that of a common carrier for hire. Judgment for plaintiff for \$2,500, in the District Court, Otoe County, affirmed. *Supreme Court, Nebraska, September Term, 1896. Missouri Pacific Railway Company v. Tietken*, 49 Neb. 130.

INJURED ON TRACK—FALLING INTO HOLE ON WAY TO BOARD TRAIN—USE OF TRACK BY ANOTHER RAILROAD—LIABILITY.—The facts in *Murch v. The Concord Railroad Corporation*, 29 N. H. 9 (1854), are as follows: "The Concord Railroad Corporation was summoned to answer Harvey Murch, of, etc., in a plea of the case, for that the defendants, at the time of committing the grievances hereinafter mentioned and before, were and now are the owners and proprietors of a certain railroad, called the Concord Railroad, for the conveyance of passengers in the cars of the said Concord Railroad Corporation, and in the cars of such other railroad corporations as the defendants permit to use their railroad for that purpose, and were then and now are, bound by law to have their said railroad so constructed and kept in such a state of repair, that all persons may, to be conveyed as passengers as aforesaid, safely go to and get into the cars of the said Concord Railroad Corporation, and into the cars of such other railroad corporations as are rightfully in the use of the said Concord Railroad, for the purpose aforesaid, at all such places as the said Concord Railroad Corporation, or such other railroad corporations as are in the rightful use of said Concord Railroad for the purpose aforesaid, by permission of said Concord Railroad Corporation, receive and take in persons, to be conveyed as passengers as aforesaid, and for that, at the time of committing the grievances hereinafter mentioned, and before and since, a certain other railroad corporation, called the Northern Railroad, were in the rightful use of said Concord Railroad, by permission of the said Concord Railroad Corporation, for the carriage and conveyance of passengers in the cars of the said Northern Railroad, and for that, on the 16th day of November, A. D. 1849, the said Northern Railroad, by request of the plaintiff,

agreed to convey him, a passenger in the cars of the said Northern Railroad, from Concord, in, etc., to Franklin, in, etc., for a certain price, to be paid to the said Northern Railroad, and on said 16th, etc., the cars of the said Northern Railroad, in which the said Northern Railroad had agreed as aforesaid to convey the plaintiff, as a passenger as aforesaid, were standing on the said Concord Railroad, by and below the freight depot of the said Concord Railroad Corporation, at, etc., a place where the said Northern Railroad, by permission of said Concord Railroad Corporation, took in and received passengers, to be conveyed in the cars of the said Northern Railroad; and the plaintiff, while the said cars of the said Northern Railroad were standing on the said Concord Railroad, at the place aforesaid, by request of the said Northern Railroad, as it was necessary for him to do, went on to the said Concord Railroad, at the place where the said cars of the said Northern Railroad were standing as aforesaid, and by the side of the cars of the said Northern Railroad, for the purpose of getting into the same, to be conveyed as a passenger as aforesaid, from said Concord to said Franklin. Yet the railroad of the said Concord Railroad Corporation was not so constructed and in such a state of repair, at said place, that the plaintiff could safely go to and get into the said cars of the said Northern Railroad as aforesaid, but, on the contrary, was so constructed and in such a state of repair, by reason of holes or openings left in the said Concord Railroad, where the track of the same crossed over and above a highway, where the said cars of the Northern Railroad were standing as aforesaid, and where the said plaintiff was going on said Concord Railroad as aforesaid, to get into the cars of the said Northern Railroad as aforesaid, to be conveyed as a passenger therein as aforesaid, that the plaintiff, in going on said Concord Railroad as aforesaid, at the place aforesaid, and for the purpose aforesaid, fell into and down one of the said holes or openings in the said Concord Railroad, a great distance, to wit, the distance of fifteen feet, and the body of the plaintiff was thereby then and there greatly bruised and wounded, and his bones badly broken, and several of his teeth, to wit, six teeth of the plaintiff, were broken and knocked out, and the plaintiff in consequence thereof suffered great pain of body and anguish of mind, and was unable for a long space of time, to wit, from said time hitherto, to transact and perform his necessary labor and business, and was and has been put to great expense for medicine, nursing and attendance for himself, and has expended large sums of money therefor, to wit, etc., all which, etc.

"Plea, the general issue.

"It appeared in evidence that on the evening of the 16th of November, 1849, one of the conductors of the freight trains on the Northern Railroad, agreed to take the plaintiff upon his train, which was to leave Concord about two o'clock the next morning, and convey him to Franklin. The train was then standing upon the Concord Railroad track, about 1,200 feet from the place of connection between the Concord Railroad and the Northern Railroad, and upon that portion of the track of the Concord Railroad, where the North-

ern freight train is generally left by the Concord road, when brought from Manchester and places south, to Concord, to be taken from thence over the Northern road.

"The Concord Railroad track was made over a passway, about 1,000 feet south of the passenger depot, and 200 feet south of the freight depot at Concord. This passway was 45 feet one way and 17 the other, and 12 feet deep. Stringers were laid across it, and crosswise of them were placed sleepers 20 to 30 inches apart, and upon the sleepers were laid the rails of the road. The freight train extended over this passway, the larger part and head of the train being above the passway.

"On the next morning, before two o'clock, it being then dark, the plaintiff, going to take passage on the train, according to the agreement with the conductor, walked along to the Passumpsic train, which was attached to the lower end of the Northern train, and inquired of the Passumpsic conductor where the Northern conductor was, and on being informed that he was at the head of his train, passed up towards the head of the Northern train, and on coming to the passway, fell through it, between the sleepers, down upon the highway below. By the fall his lips were cut, two of his teeth broken, his head severely bruised, and he was also otherwise injured.

"In regard to the manner in which the passway was made, J. A. Weston testified that he was assistant engineer on the Concord Railroad, at the time the passway was made, and that he recollected a conversation as to the manner in which it was left, and that the chief engineer and superintendent stated that the object in leaving the passway open was to keep cattle from going down upon the road; that the cattle guards on the road are built in the same way, only that they are smaller. It appeared that since this accident the corporation have caused the passway to be covered with plank.

"At the time of the accident there was a business connection between the Concord and Northern roads, by contract between them, which contract related to passengers and freight, passing from stations on the Northern road to stations below Concord, on the Concord road, and on roads below, in which the Northern and Concord roads had a joint interest, and each received a portion of the tariff. But there was no contract between them, in respect to passengers going upon the Northern road above, starting from Concord and stopping at Concord. On the arrival of the Northern trains at Concord, the Concord road took the trains over their road south, and also returned them from the south to Concord, where the Northern road took them themselves over their own road. The freight train of the Northern road upon which the plaintiff was to go, was upon the Concord track, in accordance with the terms of agreement between the two corporations.

"There was no evidence that any passengers had ever taken a passage on the Northern train at or below the passway.

"It appeared that both roads had been in the habit of occasionally transporting some passengers upon the freight trains, when they

were anxious to go; but some of the conductors were directed not to permit it, except in cases of necessity. They were also directed to state to the passengers that if they went upon the freight trains, it must be at their own risk. Sometimes this information was communicated to the passengers, and sometimes it was not. No statement of the kind was made to the plaintiff, nor had the conductor of the Northern road, who had charge of the train at this time, received any such instructions.

"It appeared that the passengers on the freight trains paid the same fare as on the passenger trains, for which the conductors accounted to the road. It also appeared that the passengers sometimes bought tickets when they went on the freight trains.

"The counsel for the defendants contended that the evidence did not sustain the declaration. The court directed a verdict for the defendants, on which it was agreed that judgment should be entered, or the verdict set aside and judgment entered for such damages as might be assessed by the Superior Court, an auditor or a jury, as the plaintiff might elect, according as the opinion of the Superior Court should be upon the whole case."

The Superior Court (per *BELL, J.*) discussed the case fully, the points decided being as follows:

"A railroad company, by giving permission to another railroad company to use a part of their track, do not bind themselves to make their track safe, nor to put it in repair, nor to make any change in its existing state.

"Such a company, by contracting to let to another company the use of their track, are under no duty to the passengers of the other railroad. The claim of such passenger, if injured, is on the company with whom he contracts.

"If a railroad is a public highway, the owners are liable, like towns, for all injuries sustained from defects in their road, by persons travelling, either on foot or in their own carriages, or in those of other persons.

"A railroad, as such, is not necessarily a public highway. If a party's rights depend on the fact that such road is a public highway, that fact must be alleged.

"The owners of railroads which are public highways are bound to make such landings or places of access to their roads, as are necessary for the public accommodation, and to keep them in a suitable and safe state for the accommodation of the persons who may be reasonably expected to use them. They are not bound to do anything where no passing can be reasonably expected.

"Railroad companies, though they are carriers of passengers by their passenger trains, are not to be regarded as common carriers of passengers by their freight trains, unless they make it an habitual business.

"In an action upon the case for negligence, the plaintiff cannot recover, if his own negligence has, in any degree, contributed to cause his injury." Upon the facts presented it was held that an

action could not be maintained, and judgment was rendered for defendants. **W. H. BARTLETT** (with whom was **PERLEY**), appeared for plaintiffs; **GEORGE & FOSTER** (with whom was **QUINCY**), for defendants.

DERAILMENT OF TRAIN—CARRIERS—ERRONEOUS INSTRUCTION—EXEMPLARY DAMAGES.—In **Taylor v. Grand Trunk Railway Company**, 48 N. H. 304 (1869), an action for damages for injuries sustained by the car on which plaintiff was travelling being overturned, due to alleged defective rail, plaintiff recovered judgment for \$1,358.50, being actual damages, \$500, and exemplary damages, \$858.50. Defendants moved to set aside verdict on ground of erroneous rulings and excessive damages. The Supreme Court, after discussing the question as to competency of testimony of parties in interest, reviewed at some length the duties of carriers, citing many authorities, and ruled to the following effect:

"Common carriers of passengers are bound to the exercise of the utmost care and diligence of very cautious persons, and are responsible for any, even the smallest negligence.

"The standard of care and diligence required of a railroad in carrying passengers does not depend upon its pecuniary condition or the amount of its revenues, but it is bound to provide a track, rolling stock, and all other agencies suited to the nature and extent of the business it assumes to do.

"A direction to the jury that a railroad must use such a degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business, is erroneous and calculated to mislead the jury.

"When an injury upon a railroad is caused by the gross negligence of the corporation, the jury may, if they think proper, award exemplary damages." Judgment for plaintiff was reversed on the ground of erroneous instructions as to gross negligence. Opinion by **BELLOWS, J.** (The question of awarding exemplary damages was reviewed at length, many authorities being cited.) **WHIDDEN & HAYWOOD** and **RAY & LADD** appeared for plaintiff; **FLETCHER & BINGHAM**, for defendants.

PERSON KILLED BY TRAIN WHILE WALKING ALONG TRACK—CONTRIBUTORY NEGLIGENCE.—In **State v. Grand Trunk Railway**, 65 N. H. 663 (1884), an action, under the statute, for negligent killing by defendant of a person who was struck by a train while walking along the track for the purpose of getting aboard, said person having been warned and knowing the danger thereof, it was held that the evidence showed carelessness of deceased, and verdict should have been directed for defendant. Judgment for defendant.

FAILURE TO PROVIDE ACCOMMODATIONS FOR PUBLIC AT RAILROAD STATIONS.—**Boothby v. Grand Trunk Railway**, 66 N. H. 342 (1890), action for damages for

injuries to a passenger received by reason of defendants' failure to keep its depot reasonably sufficient for accommodation of the public, whereby plaintiff contracted a cold from exposure to the weather while waiting for a train. Defendants moved for direction of verdict in their favor, and being denied, excepted. The Supreme Court overruled the defendants' exceptions, holding that whether the facilities furnished were reasonably sufficient was a question of fact, as was also the question whether defendants' negligence was the proximate cause of plaintiff's injury. Railway corporations are bound to provide stations and reasonable accommodation for the public, and if, through failure to furnish such, a person is injured, the railways are liable.

PERSON FALLING ON STATION PLATFORM—NON-SUIT.—In **Connor v. Concord and Montreal Railroad**, 67 N. H. 311 (1892), the facts of the case are stated in the opinion of **CLARK, J.**, as follows: "The plaintiff, who was a passenger from Concord to Laconia on the defendants' train, arriving between twelve and half past twelve o'clock, went to a millinery store and transacted some business, then returned to the depot to meet a friend expected on the train from Alton Bay. The train arrived at twenty-five minutes past one, and the friend did not come. The plaintiff, after speaking to the conductor, who was standing by the steps of the passenger car next to the baggage car, turned to go down town again, seeing the baggage master standing by his truck by the baggage car a few feet from her, waiting to receive the baggage as it was passed out to him. The width of the platform was thirteen feet and four inches, and the truck did not exceed three feet in width. The plaintiff walked rapidly along looking straight ahead; and as she came opposite the baggage master as he was receiving a piece of beef from the car, he stepped back, and she tripped over his foot and fell forward on the platform, receiving severe injuries. The baggage master was attending to his work, and did not notice the plaintiff until the accident happened. The plaintiff claims to recover damages of the railroad on the ground that her injuries were caused by the negligence of the baggage master, and produces evidence of the foregoing facts to sustain her action. The evidence is insufficient. It shows that the baggage master was attending to his duties in the ordinary place and manner, with no knowledge of the presence of the plaintiff until the accident happened. Eight or ten feet of the platform between him and the depot was unobstructed, leaving ample room for the plaintiff to pass without hindrance; and no negligence on his part is shown. The raising of the foot against which she tripped and fell was the natural movement to sustain the poise of the body, as he reached forward to take the beef from the car, and is no evidence of negligence. He was in no fault for the accident, and the railroad is not chargeable. A nonsuit was properly ordered." Exceptions overruled.

SICK PASSENGER INJURED WHILE PREPARING TO ALIGHT FROM TRAIN—VIOLENT JERK OF TRAIN—DEATH FROM INJURIES.—In **Emery, Adm'r, v. Boston & Maine Railroad**, 67 N. H. 434 (1893), action for damages for injuries sustained by a sick passenger, whose death resulted therefrom, due to violent jerk of train from which she was getting ready to alight, it was held that a motion for nonsuit was properly denied. The violent and unusual backward jerk of the car, without notice or warning to the passengers, after the train had stopped at the station and the deceased was getting ready to leave the car in the usual manner, afforded competent evidence tending to show negligence on the part of the defendants, and was sufficient to authorize the plaintiff to go to the jury.

ACKERSON v. THE ERIE RAILWAY CO.

Supreme Court, New Jersey, June Term, 1867.

[Reported in 32 N. J. Law, 254.]

DERAILMENT OF TRAIN—MISPLACEMENT OF SWITCH—RULES AND REGULATIONS—PUNITIVE DAMAGES.—In an action to recover damages for injuries sustained by reason of derailment of the train on which plaintiff was a passenger, due to misplacement of a switch, it was held that where a railroad company adopts all rules and regulations needful for the safety of the passengers and employs competent agents whose duty it is to see that these rules and regulations are observed the company, in case of injury to the passengers, happening by reason of the failure of the agents to perform this duty, cannot be held liable for punitive damages, but where the company itself is in fault it may be justly held liable for smart money.

IN CASE. On rule to show cause, etc.

Plaintiff recovered judgment for \$8,500, from which defendant appealed. The facts sufficiently appear in the opinion. *Judgment modified.*

I. W. SCUDDER and **J. F. RANDOLPH**, for the rule.

A. B. WOODRUFF, *contra*.

Dalrimple, J.—On the sixth day of November, 1864, the plaintiff, while a passenger in the cars of the defendants, received a personal injury, for which he brings this suit. The cars were thrown from the track at Callicoon, in the State of New York, by the misplacement of the switch there. The plaintiff's injuries were serious and permanent. The cause was tried at the Passaic Circuit, and a verdict rendered for the plaintiff for eight thousand five hundred dollars. A rule to show cause was granted, on motion of the defendants. They complain that the damages awarded are excessive.

On this ground alone the court is asked to set aside the verdict. No error in the rulings of the judge before whom the cause was tried, is alleged.

It appeared on the trial, that the defendants had adopted all needful rules and regulations for the running of their trains, and had employed competent persons as tenders of the switch at which the accident occurred. No care or caution required for the safety of the passengers had been omitted by the company. Through the carelessness and disobedience of their agents the accident happened. After a careful review of the testimony, I have come to the conclusion that the verdict cannot be supported, except upon the ground that the plaintiff is entitled to vindictive damages. The ruling of the judge at the trial, was that the case was not one that authorized a verdict for more damages than were actually sustained. I am satisfied that this ruling was correct, inasmuch as there was no attempt to prove any neglect of the company, as contradistinguished from its subordinate agents. In fact, the only fault or negligence complained of was that of the employee of the company. Where a railroad company adopts all rules and regulations needful for the safety of the passengers, and employs competent agents, whose duty it is to see that these rules and regulations are observed, I do not think that the company, in case of injury to the passengers, happening by reason of the failure of the agent to perform this duty, can be held liable for punitive damages. If, however, the company, as such, is in fault, a different rule applies. The company, for its own carelessness, may be justly held liable for smart money. This rule does not prevail where the carelessness is only that of a subordinate agent. There is no justice in punishing the company after it has done all in its power to prevent injury. The agent, if guilty of negligence, may in certain cases be proceeded against by indictment. I cannot yield to the argument, so earnestly urged by the counsel of the plaintiff, that by construction of law, the company is guilty of gross negligence whenever its agent is, and is, therefore, to be treated the same as if through its own gross negligence the injury happened. I think the verdict was against the charge of the court, in that it is to some extent, at least, for punitive damages. Full compensation to the plaintiff, for all real loss, present and prospective, was the proper measure of damages. That having been exceeded, the verdict should be set aside and a new trial awarded. If, however, the plaintiff will remit the excess of the verdict above the sum of \$6,500, let judgment be entered thereon for that amount, at any time during the present term.

[The plaintiff remitted the excess.]

NORTH HUDSON COUNTY RAILWAY COMPANY v. MAY.

Supreme Court, New Jersey, June Term, 1886.

[Reported in 19 Vr. (48 N. J. Law) 401.]

WITNESS—PARTY.—It was not error to admit plaintiff as a witness in an action brought by him for damages for injuries received by reason of negligence of defendant in management of its street car.

STANDING ON FRONT PLATFORM OF STREET CAR—SUDDEN START—NEGLIGENCE.—Where plaintiff was standing on the front platform of one of defendant's street cars, there not being room inside the car, and was thrown off by the sudden starting of the car, and it was proved that the driver was negligent in starting up the horses, and there was no evidence of negligence on part of plaintiff the trial court properly refused to nonsuit (1).

ON ERROR to the Hudson Circuit. The facts appear in the opinion. *Judgment affirmed.*

J. C. BESSON and J. B. VREDENBURGH, for plaintiff in error.

M. T. NEWBOLD, for defendant in error.

1. The Court of Errors and Appeals reversed the judgment of the Supreme Court. In reviewing the facts the court said: "The testimony most favorable to the plaintiff tends to prove that on September 1st, 1884, toward evening, John May stood smoking on the right side of the front platform of a horse car belonging to the defendant. He was directly behind the brake, facing it, with his back against the front of the car, and holding the hand rail behind him with his left hand. He was about thirty-five years of age, in good health, and accustomed to ride on the platform of cars, and had taken the position above described when he boarded the car, a few moments before the accident. The car was full of passengers, five or six of them being on the front platform, and was drawn by two horses. The track was straight and the grade about level.

Under these circumstances, the driver stopped, or almost stopped, the car for a lady to alight, and when she was off he whipped up his horses, and although Mr. May saw that done, yet not being prepared for it, as he says, the sudden jerk threw him off the platform and he was injured. The question is whether this testimony indicates, directly or inferentially, any negligence on the part of the company's driver. Certainly, it is not improper to whip up a pair of horses when they are required to start a car loaded with people, unless there is something extraordinary about either the horses or the whipping. Nothing extraordinary is asserted by the witnesses, but it is claimed that something of the kind may be inferred from the other statements that the car gave a sudden jerk and Mr. May was thrown off." After discussing the evidence on this point and holding

Parker, J.—John May brought suit against the North Hudson County Railway Company for damages resulting from personal injuries received by him, caused by the alleged negligence of said company. The trial resulted in a verdict for the plaintiff, and judgment was entered thereon.

The first error assigned is, that the court admitted the plaintiff below to be sworn and give evidence in the cause. It is contended that the plaintiff in error, a corporation aggregate, being only an artificial person, incapable of speaking and giving testimony, the opposing party cannot be permitted to testify, because of the provision of the statute which provides that no party shall be sworn where the opposite party is prohibited by any legal disability from being sworn as a witness.

It is true that a corporation is an artificial being, invisible and intangible, but it is a collection of individuals united in one body, acting and speaking through its officers and agents. Since the law which enacts that interest in the event shall not disqualify a witness, the officers and agents as well as stockholders, are admitted to testify. So long as they are admitted as witnesses, the corporation cannot be said to be under legal disability. The court was right in admitting May as a witness.

The next error assigned is the refusal of the court to nonsuit. When the plaintiff in the suit rested, it appeared from the testimony that he was at the time of the accident riding on a horse car of the company, and was thrown off in consequence of the sudden starting of the car by the driver. It also appeared that the car inside was full of passengers, that the platform on which May was riding was crowded, and also that the rear platform was full. It also appeared that he stood on the front platform, holding on, when the violence of the sudden jerk caused by the driver whipping his horses threw him off the car. It further appeared that May was riding as a passenger on defendant's car, in the only place he could find. The driver had received him as a passenger, and was bound to exercise care towards him, so as to carry him safely. When the case was

that such an inference was unreasonable, the court said: "When we seek in the evidence for some ground on which to base a rational inference that the driver's *manner* of whipping the horses evinced a want of due regard to the safety of the passengers, we are unable to find it, and so are left to the bare fact of whipping to

support the charge of negligence. That fact alone affords no evidence of negligence in this case. The nonsuit, when asked for, should have been granted." Judgment reversed. **ROCHAT (Adm'r of May) v. NORTH HUDSON COUNTY RAILWAY CO.**, 20 Vr. (49 N. J. Law) 445 (1887).

rested on the part of May, it had been proved that the company was negligent in starting the car suddenly, with force and speed sufficient to throw him off the platform, and there was no evidence that May had contributed to the accident. The court did right in refusing to nonsuit.

After the motion to nonsuit was refused, the company proceeded to call witnesses, and introduced evidence to contradict the testimony, which had been given as to the negligence of the company, and also to prove negligence on the part of May. Witnesses swore that May was not on the car when the accident occurred, but at the time was trying to get on the car while it was in motion. Also that the driver did not whip the horses to start the car. The case was submitted to the jury upon the evidence produced on both sides, which was contradictory. The motion to nonsuit was not renewed, nor was the court asked to instruct the jury to find for the company.

Under the circumstances, the refusal to nonsuit, if wrong, cannot now be taken advantage of. The case was tried on its merits, and the jury gave credence to the testimony offered on the part of May. Upon writ of error the court will not set aside the judgment even if it be thought that the verdict was against the weight of evidence. There must be some error in the instructions to the jury by the court, or in refusing to charge, or in the admission or rejection of evidence at the trial, to justify reversal.

The next error assigned is that the court refused to receive in evidence a statement made by the conductor of the car, reduced to writing by the president of the company the morning after the accident. When the paper was offered in evidence the court asked counsel in what view of the case he thought the evidence competent, to which question answer was made that the offer of the paper was as a statement made immediately after the accident by a person in performance of his duty. The court did right in refusing to admit the paper in evidence. The conductor was a witness, and could have given his version of what was said and done under oath. He might perhaps have used the written statement, made through his dictation in his presence, to refresh his memory, but the paper itself was not legal evidence. It was not made under oath, and if it turned out that the statement was not true, an indictment for perjury would not lie.

The remaining assignments of error are to the charge of the court. One complaint is that the judge did not charge the jury that if May was guilty of negligence the verdict should be for the company. The court did so charge in substance. In his charge the judge said: "In

stating the rule that injury resulting from negligence of one in the performance of duty is actionable, and must be paid for in damages, an important phase of this rule must be emphasized, and that is that whenever the plaintiff has himself, in any essential degree, by his own negligence contributed to the injury, there can be no recovery." And again, "If the plaintiff was in the act of boarding a passing car, it failing to stop on his signal, and by that means he became entangled and suffered injury, my instruction to you is, that was an act of contributory negligence in him such as would defeat his recovery." No language could be more emphatic.

In every respect complained of, the charge was legally correct, very carefully worded, and stated the case fairly, leaving to the jury to decide upon the conflicting evidence.

The judgment should be affirmed.

CITY RAILWAY COMPANY v. LEE.

Court of Errors and Appeals, New Jersey, March Term, 1888.

[Reported in 21 Vr. (50 N. J. Law) 435.]

PASSENGER RIDING ON FOOTBOARD OF OPEN STREET CAR KNOCKED OFF BY COLLIDING WITH PASSENGER ON FOOTBOARD OF ANOTHER CAR ON OTHER TRACK.—Where the seats and platforms of an open street car were filled with passengers, and plaintiff was obliged to take his place with others on the footboard, and was knocked off and injured by colliding with a passenger standing on the footboard of another car passing on the other track, plaintiff being a stranger to the road, unfamiliar with its construction, equipment and management, it was *held*, that if the question of contributory negligence was raised by the case, it was one for the jury, and it was properly submitted to them.

ON ERROR to the Supreme Court. *Judgment affirmed.*

"The plaintiff below became a passenger on an open car of the defendant company which at the time had passengers on board in number sufficient to occupy all the seats. When the plaintiff was invited to go on board the car there was no other room than a standing place on the running board along the side of the car. Other passengers stood upon the running board of the same, as well as the other side of the car. At the point where the plaintiff embarked there was but a single track; farther on, in the direction the car was travelling, the track was double. A car of like form on the other track, and carrying passengers upon the running board, met the car which carried the plaintiff. The space between the two cars was

not sufficient to permit persons to pass with safety, standing upon the inner running boards of the passing cars, and in the passage of these cars the plaintiff was thrown by contact with a passenger standing on the running board of the other car, and was injured. For this suit was brought, and the plaintiff recovered damages. To reverse the judgment this writ of error is brought."

H. N. BARTON and B. GUMMERE, for plaintiff in error.

CARROLL ROBBINS and JAMES BUCHANAN, for defendant in error.

Knapp, J.—The bill of exceptions sealed and sent with the record in this case presents the question whether the trial court erred in law in refusing to nonsuit the plaintiff at the close of his case in response to the request of the defendant. The suit was for negligent injury to the plaintiff below, the defendant here, received by the defendant while a passenger on a car of the plaintiff, being transported over its line. It is not contended, seriously, that at the close of the defendant's case there was no evidence to go to the jury in support of the averred negligence of the company. The ground relied upon in the defendant's defeat was that he by his own carelessness materially contributed to his own injury, and that this appeared in the evidence in his own behalf. There is no doubt as to the legal rule that negligence on the part of a plaintiff, such as contributes to the injury of which he complains, when discovered through his own testimony will preclude his right of recovery. *C. R. R. Co. v. Moore*, 4 Zab. 268, 824; *Runyon v. C. R. R. Co.*, 1 Dutcher, 556; *Drake v. Mount*, 4 Vr. 441; *Penn. R. R. Co. v. Mathews*, 7 Vr. 531; *D., L. & W. R. R. Co. v. Toffey*, 9 Vr. 525.

And it is also settled that a refusal of the court to nonsuit on request, where such ground exists for the motion, is legal error. *Horse R. R. Co. v. Ward*, 18 Vr. 560.

Whether, then, the court was wrong in its refusal to nonsuit must depend upon the existence in the testimony of such proof of fault and imprudence on the part of the defendant, exposing him to injury as, in the eye of the law, is culpable. If the testimony left that question in doubt, it was for the jury, and not the court, to determine. To determine this the facts which are not in dispute must be adverted to.

The defendant was riding on an open car drawn by two horses. When he was invited to enter, the seats and platforms of the car were filled, and he was obliged to take his place with others on the footboard running longitudinally with the car. The roof of the car was supported by stanchions or posts, opposite to one of which

the defendant placed himself. At the point where he entered this car the company had but a single track; further on the track was double, with a space of two feet eleven inches between the nearest rails of the two tracks. Two cars of the sort the defendant was riding on, passing each other on this double track, would be separated by about ten inches along the edges of the two nearest footboards, which footboards were about nine inches wide each. A person might stand on one footboard and pass a car on the other track, without injury, if the footboard of the car on such other track was free from passengers. There was not room for persons standing on these footboards to pass each other in safety if both footboards were occupied by passengers. The plaintiff below was knocked off his car and injured by colliding with a passenger standing on the footboard of a like car of the company, passing in an opposite direction along the double track. The plaintiff in error contends that the position of the defendant was obviously so dangerous a one that to take it was *in se*, negligent.

The plaintiff below was a stranger to this road, unfamiliar with its construction, equipment and management. Where he entered the company's car the track was single, and there is nothing shown to indicate knowledge on his part that it was different elsewhere. He was invited by the agent of the company to take a position on the car, and when so invited the only position left for him was that which he assumed. It was, therefore, taken with the assent of the company's agent. It appears to be the practice of the company to carry passengers there; not only on the car which he boarded, but on the car with which he collided, passengers were being carried in the same way. The mere fact of riding on a platform of a street car is not conclusive proof of negligence. *Nolan v. Brooklyn R. R. Co.*, 87 N. Y. 63 (1); *Meesel v. Lynn R. R. Co.*, 8 Allen, 324 (2); *Fleck v. Union R'y Co.*, 134 Mass. 481 (3).

In *Meesel v. Lynn R. R. Co.*, *supra*, it is truly said "that the seats inside the car are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside the car until the car is full, then to stand upon the platforms until they are full, and continue to stop and receive them even after there is no place to stand except on the steps of the platforms. Neither the officers of this corporation or

1. Reported with the *New York* cases in this volume, *post*.

2. Reported with the *Massachusetts* cases in this volume, p. 446, *ante*.

3. *Fleck v. Union R'y Co.*, 134 Mass. 481, is reported in 8 Am. Neg. Cas. 801.

the managers of the cars, nor the travelling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained upon the ground of its danger. There is, therefore, no basis upon which the court can decide on the evidence that the plaintiff did not use ordinary care."

In that case the plaintiff was injured by being thrown from the platform of a moving car.

It has been asserted as a rule of law that a carrier who assigns a passenger in his charge to a position of danger may not, in case of injury, set up the passenger's acceptance of such a position as contributory negligence, but is estopped from so doing. A rule so broadly stated must admit of many exceptions. The duty of a carrier in transporting passengers is one which calls for a high degree of care, but it is not one amounting to absolute insurance of safety. He has not control of the person of the passenger. He has the right to adopt and enforce reasonable rules for the safety of his passengers, and to these, when made known to him, the passenger is bound to conform. The passenger is at liberty to conclude that rules or directions of the carrier assigning him to place or position are subservient to the duty which the carrier owes him, and that he may take such position in safety unless to do so would be a blind surrender of care and judgment for his own safety, or an inexcusable failure to use his senses to that end. It certainly cannot be contributory negligence that he, at the invitation of the defendant, exposed himself to risk of danger created by the defendant, and which he did not know and of which no warning was given.

The position on this outside platform undoubtedly was attended with some risks and exposures. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing. And had the plaintiff received his injury from such cause, it may be that negligence contributing to his injury would be imputed to him. But he was not presumed to know that the company's road was so constructed, or its cars so run as to render a position in which it invited him to ride, a dangerous one.

If the question of contributory negligence was raised by the case, it was one for the jury, and there was no error in refusing to nonsuit and submitting that question to them.

The judgment should be affirmed.

For affirmance: THE CHANCELLOR, DEPUE, DIXON, GARRISON, KNAPP, MAGIE, REED, SCUDDER, VAN SYCKEL, MCGREGOR, WHITAKER. *For reversal:* None.

CONSOLIDATED TRACTION COMPANY V. THALHEIMER ET AL.

Court of Errors and Appeals, New Jersey, November Term, 1896.

[Reported in 59 N. J. L. (30 Vr.) 474.]

PASSENGER PREPARING TO ALIGHT THROWN FROM STREET CAR—SUDDEN JERK—*RES IPSA LOQUITUR*.—1. The occurrence of a "lurch" or "jerk" of a street car of sufficient violence to throw off the car a passenger who had notified the conductor of her desire to get off at Fifth street, and who, after the conductor called out Fifth street, had arisen and gone to the rear door in preparation for alighting, justifies an inference of some breach of the duty owed to her by the carrier, and falls within the maxim "*res ipsa loquitur*."

STANDING AT DOOR OF STREET CAR NOT NEGLIGENCE *PER SE*.—2. A passenger on a street car who, on being notified that the car is approaching the point where he desires to leave it, gets up and goes to the door of the car, while it is in motion, for the purpose of being ready to alight, is not necessarily guilty of negligence. Such conduct is not, *per se*, negligent. Whether it is so or not is for the jury to find under the circumstances.

ON ERROR to the Essex Circuit. *Judgment for plaintiff affirmed.*
The facts appear in the opinion.

JOSEPH COULT, for plaintiff in error.

SAMUEL KALISCH, for defendants in error.

Magie, J.—The judgment in this case was recovered by Albert Thalheimer and his wife against the Consolidated Traction Company, for damages sustained by each of them from an injury to Mrs. Thalheimer for which the jury found the traction company to be liable.

The questions raised by the assignments of error can all be considered under the assignment which challenges the correctness of the refusal of the trial judge to nonsuit the plaintiffs below.

When the motion to nonsuit was made, the only evidence of the liability of the traction company was that given by Mrs. Thalheimer. If believed, the evidence established the following facts: That Mrs. Thalheimer was a passenger in a street car operated by the traction company, and running upon Orange street, in the city of Newark; that she notified the conductor of the car that she desired to alight therefrom at Fifth street (which crossed Orange street); that when

the car approached Fifth street the conductor called out the name of that street; that she got up from her seat, while the car was still in motion, and walked to the rear door of the car which was open, and when she arrived at the door and was just coming out of it, she was thrown into the street by a movement of the car which she called a "lurch" or a "jerk," and described as of sufficient force to "throw her right off." The fall produced serious injury.

The motion to nonsuit was put upon two grounds—*first*, that the evidence failed to show any breach of the duty which the traction company owed to its passenger, Mrs. Thalheimer, and *second*, that if such breach of duty could be inferred, the evidence disclosed that she had contributed to her injury by her own negligence.

After the motion was denied, the traction company gave evidence which, if believed, showed that Mrs. Thalheimer fell upon the street after she had safely alighted from the car, and which might justify the inference that her fall was due to the inequalities of the surface of the street, which was paved with cobblestones. Upon an application for a new trial, a serious question would be presented as to the weight of this conflicting testimony; but, upon error, the weight of testimony cannot be considered. Our review is limited to the consideration of the question whether Mrs. Thalheimer's evidence, if credence were given to it, was sufficient to establish the liability of the traction company to answer for her injury.

The contention that the evidence in question was insufficient to show a breach of the duty which the traction company, as a carrier of passengers, owed to Mrs. Thalheimer cannot, in my judgment, prevail. That duty has been described in this court as calling for a high degree of care. *City Railway Co. v. Lee*, 21 Vr. 438 (1). As street cars run upon rails fixed and leveled in the highway, and not permitting lateral motion, and are provided with brakes, which, when applied quickly, or when, after being applied, are released quickly before the momentum of the car has been overcome, produce known mechanical effects upon persons on the car, the occurrence of a lurch or jerk of the violence described, fairly justifies an inference that either the tracks were improperly laid or were out of order, or the brakes were improperly handled. At all events, the fact that such a lurch or jerk occurred as would have been unlikely to occur if proper care had been exercised, brings the case within the maxim "*res ipsa loquitur*," as expounded in the Court of Errors in *Bahr v. Lombard, Ayres & Co.*, 24 Vr. 233, and in the Supreme

1. See preceding case reported.

Court in *Excelsior Electric Co. v. Sweet*, 28 Vr. 224. The case last cited was reversed by the Court of Errors [30 Vr. 441], but the opinion on this subject was not there questioned.

The contention that the evidence showed that Mrs. Thalheimer was guilty of contributory negligence is no better founded. When notified that the car was near the place where she wished to get out, she arose and went to the door of the car, as thousands of passengers in such cars daily and hourly do. Her movement was made in preparation for speedily leaving the car. Such conduct is not negligent *per se*. *Nichols v. Sixth Ave. R. R. Co.*, 38 N. Y. 131 (1); *Wylde v. Northern R. R. Co.*, 53 N. Y. 156 (2). It may be questioned whether the evidence of her movement would justify an inference of negligence; but, at the most, it was a question for the jury whether, in preparing to leave the car, Mrs. Thalheimer was acting without proper care.

No error being discovered in the conduct of the case in the trial court, the judgment should be affirmed.

DIXON, GARRISON, MAGIE, BARKALOW, BOGERT, DAYTON and HENDRICKSON, J. J., for *affirmance*.

THE CHANCELLOR, GUMMERE, VAN SYCKEL and NIXON, for *reversal*.

NEWARK AND SOUTH ORANGE RAILROAD COMPANY v. McCANN.

Court of Errors and Appeals, New Jersey, March Term, 1896.

[Reported in 29 Vroom (58 N. J. L.) 642.]

SICK PASSENGER FALLING THROUGH DOOR OF STREET CAR.

—The plaintiff, being the only passenger in a street car, became suddenly ill, told the conductor she felt sick, and twice requested him to stop the car, so that she might get off; he failed to do so, and going to the front of the car began talking to the motorman. The plaintiff, growing worse and becoming frightened and dazed, rose to her feet and staggered toward the rear of the car and there fell unconscious through the door. *Held*, that whether the plaintiff was guilty of negligence, and whether the plaintiff's injuries were the natural and proximate consequence of the conductor's negligence were all questions of fact for the jury.

1. *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131, is reported in 5 Am. Neg. Cas. 109.
2. *Wylde v. Northern R. Co.*, 53 N. Y. 156, is reported in 5 Am. Neg. Cas. 189.

ON ERROR to the Supreme Court. The facts appear in the opinion. *Judgment affirmed.*

ELIAS F. MORROW, for plaintiff in error.

ROBERT H. MCCARTER, for defendant in error.

DIXON, J.—The questions raised on this writ of error relate to the refusal of the learned justice at the trial to nonsuit the plaintiff or to direct a verdict for the defendant.

The circumstances shown on behalf of the plaintiff were these: The plaintiff, a girl eighteen years old, was the only passenger in the defendant's street car; while there she became sick, and going to the car door she told the conductor that she was sick and asked him to stop the car so that she might get off; he told her to sit down and she would feel better after a while; she sat down but felt sicker all the time. Presently the conductor passed through the car, and she again appealed to him to stop; but he looked at her, smiled, went on to the front of the car and began talking to the motorman. She then felt dizzy and sick at the stomach, became frightened and dazed, got up from her seat and staggered toward the rear door for the purpose, she said, of seeing whether she could not get someone on the street to stop the car, and fell unconscious through the door, remaining unconscious for several weeks. The car had then six hundred and seventy feet to go before reaching the end of the electric route, at which point the plaintiff was to be transferred to a horse car of the defendant for carriage about a mile further to her destination.

On these circumstances the defendant takes three positions—that negligence on the part of the plaintiff is shown, that negligence on the part of the defendant is not shown, and that if it is, the plaintiff's injury is not the natural and proximate consequence of such negligence.

First, as to the plaintiff's negligence:

In view of her youth, her illness and her mental disorder, we cannot say, as matter of law, that she was bound to exercise the same degree of care and forethought as persons of mature years, in the full possession of their faculties, would ordinarily exercise, and it was for the jury to determine whether, under the peculiar conditions then existing, she used such prudence as it was reasonable to require.

Second, as to the negligence imputable to the defendant:

It was lawful for the jury to find that, when the plaintiff made her second appeal to the conductor he was apprised of her serious illness,

or at least should have inquired further as to her condition. They also had the right to conclude that, on perceiving or informing himself of the extent of her sickness, it became his duty either to stop the car so that she might alight, as she requested, or else to afford her such reasonable attention as would save her from harm because of her detention in the moving vehicle. He did none of these things, but passed her by heedlessly and left her utterly uncared for, when there was no other person at hand to render her assistance. Such conduct would not fulfill the duty of the defendant as a carrier of passengers. It is but a corollary from the principle which enjoins upon these carriers reasonable care for the security of their passengers, that when, through sudden illness, a passenger becomes less able to look after his own safety, and that fact is made known to the proper agent of the carrier, the latter must exercise toward the passenger a greater degree of care than is demanded in ordinary circumstances. *Sheridan v. Brooklyn City & N. R. R. Co.*, 36 N. Y. 39; *Pittsburg & C. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Atchison, T. & S. F. R. R. Co. v. Weber*, 33 Kan. 543; *Croom v. Chicago, M. & St. P. R. R. Co.*, 52 Minn. 296 (1).

The last point for consideration is the connection between the negligence of the conductor and the plaintiff's injuries.

In suits of this character the law requires that the damages chargeable to the defendant shall be the natural and proximate result of his delinquency. The term "natural," imports that they are such as might reasonably have been foreseen; the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the loss and the defendant's fault. *Wiley v. West Jersey R. R. Co.*, 15 Vr. 247. Of course it is not necessary that the wrongdoer should be able to anticipate the very occurrences which resulted from his laches; it is enough if, after they have happened, they are seen to have flowed from his misconduct in the natural course of things and within the range of reasonable probability; and it must generally be left to the jury to determine according to the circumstances whether the facts fit the standard of naturalness. *Hammill v. Penn. R. R. Co.*, 27 Vr. 370, 378.

In the present case the behavior of the plaintiff was not necessarily either an unnatural or an unlikely consequence of the conductor's disregard of her requests and her condition. Being seized with a sudden and increasing sickness, and impressed with the thought that

1. The cases cited are reported under their respective States in this volume.

she must leave the car for relief, the jury might deem it both natural and probable that, when the conductor refused to stop the car, she should seek other means of attaining her object, and might, in her confusion, adopt measures ill-suited to her purpose. We cannot adjudge that such a conclusion was illegal.

The question whether the injuries were the proximate effect of the conductor's neglect also lay, we think, within the province of the jury. If they determined that the acts of the plaintiff, after the conductor failed to stop the car at her second request, were not blameworthy, then his negligence was, in a legal sense, the proximate cause of the ensuing accident. The fact that between the defendant's fault and the plaintiff's injury there are intermediate acts of other persons, even of the plaintiff, will not render the injury too remote for legal contemplation and redress, if the intervening acts are not wrongful, and either naturally follow upon the defendant's misconduct or merely furnish the conditions on which that misconduct operates. Recent instances of this nature are common in our own reports. *Finegan v. Moore*, 17 Vr. 602; *Houston v. Traphagen*, 18 Vr. 23; *Driscoll v. Carlin*, 21 Vr. 28; *City R'y Co. v. Lee*, 21 Vr. 435 (1); *Buchanan v. West Jersey R. R. Co.*, 23 Vr. 265 (2); *Phillips v. Library Co.*, 26 Vr. 307; *New York, Susq. & W. R. R. Co. v. Marion*, 28 Vr. 94.

We find no error in the record, and the judgment must be affirmed.

THE CHANCELLOR, CHIEF JUSTICE, GARRISON, MAGIE, BARKALOW and BOGERT, JJ., concurred in *affirmance*.

GUMMERE, LIPPINCOTT, LUDLOW, VAN SYCKEL and NIXON, J.J., *dissented*.

PENNSYLVANIA RAILROAD COMPANY v. RUSS (ADMINISTRATOR).

Court of Errors and Appeals, New Jersey, June Term, 1894.

[Reported in 28 Vr. (57 N. J. Law) 126.]

MAIL BAG THROWN FROM TRAIN—NOTICE.—A notice, with respect to throwing United States mail bags off the moving trains of the Pennsylvania Railroad Company, uses this language: "It must be distinctly understood, however, that this does not in any way relieve baggage

1. Reported in this volume, page 562, *ante*.
2. Reported in this volume, page 574, *post*.

masters and mail agents from using all possible precautions against liability of injuring anyone in throwing off mail." *Held*, that on trains carrying a mail agent, the failure of baggage masters to observe how the mail agent performed his duty did not, under this notice, make the railroad liable to one injured by a mail bag carelessly thrown by the United States official.

ON ERROR to the Supreme Court. *Judgment reversed.*

WILLIAM S. GUMMERE, for plaintiff in error.

RICHARD V. LINDABURY, for defendant in error.

Garrison, J.—This is an action against the Pennsylvania Railroad Company, for causing the death of Henry Papenburg, the plaintiff's intestate. Papenburg was struck and killed by a United States mail bag thrown from the mail car attached to one of defendant's trains. The bag was thrown from the postal car, not by one of the defendant's servants, but by the mail agent of the United States government. The place where the bag was thrown from the train was about the center of Cherry street, in the city of Rahway. Papenburg was approaching Cherry street across a triangle of ground belonging to the railroad company, upon a beaten track lying near to and parallel with the railroad tracks and used by the public in gaining access to the station. About the middle of this triangle, alongside the track, a mail crane had been erected, from which moving trains might take on mail bags. The foot of this crane was the spot designated for throwing off mail bags. In order that the bags thrown from rapidly moving trains should fall at the foot of this crane, it was necessary to throw them off before the mail car had actually reached the crane. Upon the occasion in question the United States mail agent threw off the bag some eighty feet before reaching the crane, causing thereby the fatal accident to Papenburg, who was lawfully at the place where he was struck and killed.

In this situation of affairs two interesting questions arose and were to some extent discussed—first, the liability of the defendant for the acts of the servant of the United States government, and second, the negligence of the defendant in designating for a performance of this character a spot so near to a travelled pathway over its own property, that, in the natural course of things, injury might befall one lawfully using this thoroughfare.

These questions are, however, not presented by the case with which we have to deal, for the reason that the negligence of the company was put by the trial court upon another and different

ground, in which aspect alone it is before us upon a specific exception on which error has been assigned.

The ground of negligence thus alluded to is that it was the duty of the baggage masters of the defendant company to observe how the mails were thrown off and to use precautions against injury therefrom, and in this connection the jury was told that any neglect of this duty by the baggage master by which injury arose was the neglect of the company. Inasmuch as there was no attempt to prove that the baggage master of the train in question had supervised the throwing off of the mail bag by which Papenburg was killed, it is clear that the defendant was guilty of neglect of its duty in this respect if that duty was correctly stated in this instruction. The basis of the court's charge upon this point was a printed notice in evidence, designating the places for the delivery of mail from moving trains. This notice was signed by Joseph Crawford, superintendent of the defendant company, and also by R. C. Jackson, superintendent of the United States mail service. It reads as follows:

"General Notice to Passenger Trainmen and Mail Agents.

Baggage masters and mail agents are hereby instructed to throw off mail bags at the points designated in the following statement. It must be distinctly understood, however, that this does not in any way relieve baggage masters and mail agents from using all possible precaution against liability of injuring anyone in throwing off mail."

The instruction of the trial judge upon this branch of the case was as follows: "I call your attention to the notice given by Crawford, the superintendent of the railroad company, to the trainmen on passenger cars as well as to the mail agents. He expressly made it the duty of the baggage masters, who are railroad employees, to use all possible precautions against injury by throwing off the mails. It was thus made the duty of these baggage masters to observe how the mails were thrown off, and any neglect on their part by which injury was done was the neglect of the defendant company."

The conclusion I have reached is that the learned judge misconceived the meaning of this notice, and, in consequence of such misconception, placed the liability of the defendant upon an untenable ground. The jury, was, in effect, told that when mails were thrown from moving trains, whether by trainmen or by mail agents it was the duty of the railroad baggage masters to observe the operation with the view of averting injury, and that their failure in this respect would be the neglect of the railroad company. Applied to the case of a mail bag thrown from a mail car by the United States official in charge thereof, I do not think that this notice contemplated any

oversight or interference by the ordinary trainmen or that, properly interpreted, such a direction will be found in it. In the course of the case it was shown that some trains carried mail cars in charge of mail agents, while upon others the duty of handling the mails was left to the railroad employees. The natural meaning of the joint notice of the federal government and the railroad company, in view of this fact, is not that baggage masters on trains that carried United States mail agents should oversee the latter, but that whosoever duty it was to throw off the mail—mail agents from mail cars, baggage masters from baggage cars—should observe care and exercise all possible precautions against injury.

The injurious effect of the court's instructions must at once appear, for it is admitted that, in the case in hand, the baggage-master of the defendant did not oversee the United States mail agent who threw off the bag. This omission in itself would, under the charge of the court, be plenary proof of negligence, and upon this ground of error, we must, on this argument assume that the jury rested its verdict. Deeming, as we do, that this instruction was erroneous, and considering the question of contributory negligence as one that was properly left to the jury, there must be a *venire de novo*.

For *affirmance*: None.

For *reversal*: THE CHANCELLOR, CHIEF JUSTICE, ABBOTT, DEPUE, DIXON, GARRISON, LIPPINCOTT, MAGIE, REED, BOGERT, BROWN, KRUEGER, SIMS, SMITH.

WOMAN INJURED AT STATION—SHOCK CAUSING SICKNESS.—In *Buchanan v. West Jersey Railroad Company*, 23 Vr. (52 N. J. Law) 265 (Supreme Court, 1890), motion for a new trial, the plaintiff, who was a woman, was lawfully on the railroad platform of the defendant. A piece of timber projected from one of the cars of a train so as to sweep over such platform, and the plaintiff, in order to avoid being struck by the projecting timber, was obliged to throw herself on the platform. She did so, and the timber passed over without touching her. By reason of the shock to her nervous system, occasioned by this peril, her health was seriously impaired. Verdict in her favor. On motion for new trial the court (per BRASLEY, CH. J.) said: "This rule should be discharged. The suit was not on the single ground that the plaintiff had been frightened. There was a basis for the action in the carelessness of the company which compelled the plaintiff to throw herself upon the platform, as such carelessness, leading to that result,

was *per se* actionable. The fright was an incident to such cause of action, and a mere aggravation of the tort. It is not necessary in this case to decide whether mere fright caused by a wrongful accident, which results in physical injury, as, for example, sickness, is or is not actionable." Rule discharged. **PETER L. VOORHEES**, for the rule; **J. W. WESCOTT**, *contra*.

COLLISION BETWEEN STREET CAR AND RAILROAD TRAIN—LIABILITY.—The facts in **Bennett v. New Jersey Railroad and Transportation Co.**, 7 Vr. (36 N. J. Law) 225 (Supreme Court, 1873), are as follows: The cars of the Jersey City & Bergen Railroad Company, in crossing the track of the defendants, the New Jersey Railroad and Transportation Company, were struck by the locomotive of the latter company. At the time of this occurrence the plaintiff was a passenger in the horse car, and was considerably injured by the collision. The jury found the servants of the defendants in fault, and gave the plaintiff \$5,000 damages. The case went to the Supreme Court on a motion for a new trial, founded on two grounds: first, for a misdirection in matter of law at the circuit; and, second, because the damages were excessive. The court reviewed the case and held that the jury were rightly instructed that the carelessness of the driver of the street car in which plaintiff was a passenger, could not affect the suit or bar plaintiff's right to recover for the negligence of the defendant.

PASSENGER IN BAGGAGE COMPARTMENT—COLLISION.—In **New York, Lake Erie & Western R. R. Co. v. Ball**, 24 Vr. (53 N. J. Law) 283 (Supreme Court, 1891), an action for damages for injuries sustained by plaintiff below, who while in the baggage compartment at the rear of the smoking car, he having gone there on account of all seats being occupied in the smoking car, was injured by a rear end collision in trying to escape from the car. Judgment for plaintiff for \$25,000. The Supreme Court sustained the judgment except as to damages on which point it said that it was plain that considerably over \$15,000 of the amount had been awarded upon anticipated future loss and injury to plaintiff, and that the evidence failed to furnish any justification for such an award. If plaintiff remitted all damages in excess of \$15,000, verdict would stand.

See note of the Ball case in 5 Am. Neg. Cas. 36.

RIDING ON FREE PASS—EXEMPTION FROM LIABILITY FOR INJURY—VALIDITY OF CONTRACT.—In **Kinney, et al. v. The Central Railroad Company of New Jersey**, 5 Vr. (34 N. J. Law) 513 (Court of Errors and Appeals, November

Term, 1869), plaintiff's intestate was killed while riding upon defendants' railroad on a free pass. The pass was issued with an agreement that decedent assumed all risk of accident, and that the railroad company should not be liable, under any circumstances, whether for negligence by their agents or otherwise, for any injury to his person or loss or injury to his property while using the ticket. The special verdict of the jury found negligence in the agents of the company. *Held*, that in the absence of proof to the contrary, such finding must be presumed to be ordinary negligence. Judgment of Supreme Court for defendants affirmed.

The Supreme Court in **KINNEY, ET AL. v. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY**, 3 Vr.(32 N.J. Law) 407 (1868), fully discussed the validity of the contract and held that the contract which the deceased made with the railroad company was valid in law, and afforded a full defense to the action. *Held*, that defendants were entitled to judgment on the verdict. Affirmed by the Court of Errors and Appeals (see preceding paragraph). The Supreme Court ruled that the contract was not made with defendants as common carriers, but was asked and accepted by the decedent as a gratuity, which was sustained by the Court of Errors and Appeals, the latter saying that to hold otherwise would be to say that a man, from the mere fact that his occupation is that of a common carrier, cannot, as to an individual transaction, be a gratuitous bailee.

BOY INJURED AT STATION—PLEADING—ERRONEOUS INSTRUCTION.—In **MURRAY v. SILVER CITY, D. & P. R. Co.**, 3 New Mex. 337 (1886), where a boy was injured by a train at a station, and the declaration alleged careless running of train, it was error to permit evidence that the injury occurred through defective construction of station platform and an instruction on that issue was erroneous. Judgment for plaintiff for \$3,280 reversed.

PASSENGER ON STEAMBOAT FALLING OVERBOARD—RAILING ON DECK.—In **Dougan, Adm'r, v. The Champlain Transportation Company**, 56 N. Y. 1 (1873), an action to recover damages for the death of plaintiff's intestate, alleged to be due to defendant's negligence, the judgment of nonsuit was affirmed. The court, after holding that the courts of this State had jurisdiction to try the case, the defendant's claiming admiralty jurisdiction, the death of plaintiff's intestate taking place while a passenger on defendant's boat, navigating the waters of Lake Champlain between

Plattsburgh and Whitehall, receiving and landing passengers and freight at various intermediate ports in this and the State of Vermont, while within this State, stated the facts of the case as follows:

"Another ground of the motion for a nonsuit was that there was no proof of negligence of the defendant contributing to the death of the deceased. Upon this there was no conflict in the testimony. The proof showed that the boat upon which the deceased took passage had a gangway in the forward part about eight feet in width, with a stanchion in the center, which was covered with rails, about three feet high, which were attached by hinges to the bulwarks of the same height, inclosing the residue of the forward part of the boat; that these rails were swung back, when necessary, for the purpose of receiving and landing passengers and freight, and were, when this was done, again placed over the gangway and fastened to the stanchions; that they were so fastened when the deceased fell overboard. That the residue of the forward part of the boat was boarded up three feet high. That the accommodations for passengers were in other parts of the boat, and none in this forward part, though passengers were permitted to and did, sometimes, come out into and stay in this forward part, with the knowledge of the defendant's employees. That the deceased, about dusk, while the boat was running upon her trip, and the deck somewhat icy, and the wind blowing hard, came through a door from the room immediately in rear of this forward part; that his hat was blown off, and he sprang to recover it, and while so doing fell down and slipped under the railing upon the gangway, overboard, and was drowned. It will be seen that the only proof of negligence was the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury; but the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years; and there was no proof tending to show that anyone had ever before fell and gone overboard under the railing, or that any such danger had been apprehended by anyone. It is obvious that no such thing was likely to occur. Indeed, a man would be much more likely to get overboard by falling over than under the railing. True, it would be unsafe for small children to run upon this part of the boat, as they might run under the rail and fall overboard; but there was no evidence that children were ever permitted to be in this part of the

boat, except to go on and off in port; there was nothing showing that any passengers were ever expected to be there except for this purpose. The counsel for the appellant cites cases where it has been held that carriers of passengers are required to exercise the utmost care in their vehicles, machinery, etc., used in their transportation, and that for this purpose they are required to use all the safeguards furnished by science generally known; but these were cases of the explosion of steam boilers; the breaking of axles of railway coaches, defects in railway tracks and the like, where experience had shown that danger was to be apprehended and necessary to be guarded against. But when, as in the present case, numerous boats constructed in the same way had been run for years with perfect safety to the passengers, where there was no ground for supposing that any passenger ever permitted to be there would fall under the railing, to find negligence from a failure to board up the space so as to preclude such a possibility, could not be justified. Proof was given that two passenger boats navigating the Hudson had the gang space boarded up; but that this was done to prevent passengers from falling overboard does not appear. The proof offered that the defendant, after the accident, boarded up the space, was properly excluded. This was immaterial. Its negligence was to be determined by what was known before and at the time of the accident." Judgment of nonsuit (6 Lans. 430) affirmed. Opinion by GROVER, J. SAMUEL HAND, appeared for appellant; A. C. HAND and FRANCIS A. SMITH, for respondent.

PASSENGER STRUCK BY HAWSER ON STEAMBOAT.
—In **Miller v. Ocean Steamship Company of Savannah**, 118 N. Y. 199 (1890), plaintiff recovered judgment in action for injuries sustained while a passenger on defendant's boat. It appeared that on March 10, 1885, plaintiff took passage at New York for Savannah, on the "City of Savannah," which arrived at the latter place on the morning of the 13th of that month. Plaintiff was on the hurricane deck with several other passengers. A line was thrown out from the bow and secured to the wharf, with a view to turn the vessel around before landing. This was unusual, and to accomplish it the flood tide in the Savannah river was relied upon, but when the vessel had turned so as to be about at right angles with the landing, her further progress in turning was interrupted by slack tide. The hawser was then brought into requisition to force her around, and for that purpose it was secured at the proper place on the deck, taken through the stern chock, and then carried along on the

hurricane deck to the capstan to the bow, operated by an engine beneath the deck, and to prevent the hawser coming in contact with the pilot house, cabins, and other structures on the deck, it was necessary to guy the hawser away from them. This was done by putting it through a pulley block with a loop in the steamboat bow chock, held there by a toggle on the outside. The hawser thus placed ran along from the stern on the deck, near that side, to and through the block, and at little more than at right angles from there to the capstan, which was put in motion, and the force applied was such that the toggle suddenly gave way, and the hawser sprang forcibly back into line between its entrance at the stern and the capstan. The plaintiff was struck by it, knocked down, and the bones of one of her legs broken. This was not caused by any fault in the construction of the ship. It was well made, staunch, and fully manned. The defect which caused the calamity was in the character, substance or condition of the toggle put into the loop to hold the block, through which the line passed, to its place; or, in the manner in which the toggle was put into the loop. The Court of Appeals after stating the foregoing facts, said: "The burden was with the plaintiff to prove negligence on the part of the defendant. In view of the danger of serious injury to passengers on the deck, which might result from failure to properly secure the hawser, with the strain upon it, to its place, the fact, when and as it appeared, that the accident was caused wholly by the defective condition of the means employed by the defendant and under its control, was sufficient to raise the presumption or inference of negligence on its part, and to call upon the defendant for explanation by evidence showing that the cause of the injury was consistent with the faithful discharge of its duty to those whose safety as passengers was intrusted to the care and diligence of the defendant's employees engaged in operating the vessel." The court (per BRADLEY, J.) reviewed the facts and defendant's exceptions and affirmed the judgment.

CLEVELAND V. NEW JERSEY STEAMBOAT COMPANY.

Court of Appeals, New York, January 1891.

[Reported in 125 N. Y. 299.]

PASSENGER PUSHED OVERBOARD BY CROWDING OF OTHER PASSENGERS ON STEAMBOAT—STEAMBOAT COMPANY NOT LIABLE.—Where a man attempted to jump from defendant's

steamboat to the wharf after the starting of the boat and fell overboard, and in the rush of passengers to the side of the boat where the accident occurred plaintiff was pushed overboard, due to alleged negligence of defendant's employee in failing to close the gate on the boat before the steamer started, it was held that the injury to plaintiff was the result of an accident for which defendant was not responsible (1).

APPEAL from judgment of General Term of the Supreme Court in the Fourth Judicial department, entered upon an order made July 20, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

The facts sufficiently appear in the opinion. *Judgment reversed.*
W. P. PRENTICE, for appellant.

EDWIN H. RISLEY, for respondent.

Peckham, J. — This is the third time this case has been before us. On the former appeals the judgments for the plaintiff were reversed on the ground that no negligence on the part of the defendant was proved. Subsequent to the last reversal a third trial was had at the Circuit and the plaintiff was nonsuited in obedience to what was supposed to have been the ruling of this court. That nonsuit was set aside on appeal to the General Term of the Supreme Court, and a fourth trial was had, resulting in the recovery of a judgment by the plaintiff, which has been affirmed by the General Term, and from that affirmance the defendant has appealed here.

The action was commenced on the 18th of December, 1873, and from that time it has been fought with great tenacity by both sides. The case is a strong illustration of the uncertainties inherent in the application of well-known and easily-understood principles of law to facts as they appear on different trials. One side contends that the facts now before us are substantially the same as those which have been passed upon by this court in the former appeals, while the other contends that the principal question for us now to determine has never been decided adversely to him by this court, nor has it been presented on its merits as it now stands.

We must take the case from the record now before us, and if the plaintiff made out a case to go to the jury we cannot interfere, although the defendant should claim that the evidence on the part of the plaintiff was so contradictory as to be unworthy of belief.

1. A former appeal in this case (CLEVELAND v. NEW JERSEY STEAM-BOAT CO.) is reported in 68 N. Y. 306; a memorandum of a second ap-

peal appears in 89 N. Y. 627; in both of which appeals judgments for plaintiff were reversed.

In general the credibility of witnesses is for the jury to pass upon, and this court has no function of that kind to perform.

Some things have been adjudicated in the former appeals, and are not now open for discussion. It has been decided that the plaintiff was on the boat in the character of a passenger, and the defendant owed him the duty which a carrier of passengers owes to a person in its charge as such. It was conceded then, and is not denied now, that the defendant had on its boat all the appliances necessary and proper to prevent such an accident. It was stated on the first appeal that it was plain the accident would not have happened, but for an extraordinary and unprecedented concurrence of circumstances, viz: the attempt of three rash persons to regain the land after the boat had started; then the heedless and unthinking rush and pressure of a crowd of passengers of ordinary sobriety and prudence, and then the wrongful opening of the gate by an unauthorized person. Had not these three things conjoined, the court could not say that the plaintiff would have been harmed.

Upon the trial now under review the plaintiff claimed that the defendant was negligent in not closing the gangway before the boat started, as it had ample means for doing so, but failed to use them. He also claimed that in starting the boat before the gangway was closed the servants of defendant disobeyed its standing orders, which he stated were to close and secure the gangway as soon as the gang plank was hauled and before the boat started. The plaintiff's counsel argues that there is a difference which is most material between the fastening of the gate itself before the boat started, and putting in place the rail (which was put on top of the gate), and stanchions before such starting. It was held on the first appeal that defendant was not chargeable with negligence in not putting in place the rail and stanchions before the boat started. Judge Folger said that experience had not shown that danger was to be apprehended from that source, or that it was necessary to be guarded against. (68 N. Y. 306, at page 313.)

In order to see precisely what the case now before us is, it is best to take some extracts from the evidence, on the part of the plaintiff, as to what was the condition of things when the accident occurred. I will take the evidence of the plaintiff and his friend Schwab who accompanied him, which is as favorable an account for him on the facts as can be found in the record.

Having approached the boat, which was lying at its slip in New York City a short time prior to its departure on the 8th of September, 1873, at six o'clock P. M., the plaintiff and his friend boarded

it on its starboard side, a little aft the wheelhouse, the boat heading towards the west. They went from the dock down on the boat by means of a gang plank about the width of the gangway opening, and which plank was guarded with rails on each side. Continuing, the plaintiff says: "I went on the boat and turned around, took my handkerchief out of my pocket and waved it to my friends on the pier. Just at that time, I think, the boat started. I heard an order to cast off or throw off the line—something like that, I did not understand about it, and the boat started. Just at that instant somebody from back in the crowd—back in the boat—came running through the crowd hallooing and coming pretty fast, rushing against the people and coming towards the edge of the boat to get off. The boat was going—had gone quite a distance—probably twenty-five feet. It had swung out away from the pier twelve or fifteen feet, I should think. This man jumped out of sight overboard. There was a man that was there by the gate. The people hallooed 'man overboard,' and immediately there was a big rush that pushed seven or eight of us in immediately. I heard the order to haul in the gang plank. I didn't understand whether it was to haul in or haul out. I know it was swung out on the pier. They raised the end on the boat and swung it in, just raised it up and swung it back on the pier. Just at that time the hawser was cast off, going on at the same time; there was men right there, had the big lines in their hands then, right at the edge of the gangway. That was at the same time the hawser was being hauled up. They swung it up and commenced hauling up the hawser at the same time. The boat was going. The mate had the gate. Mr. Mull was the mate. At the time this man came through, Mr. Mull was standing partly in front of the gangway opening at the post this gate sets on. He had the gate. I suppose he was in the act of putting it in. He had the gate in his hand, partly in front of the gangway opening; as this man came through he partly turned; he had hold of the gate some way with both hands; this man passed right by through there along the boat, outside of this guard and stepped right along on that and jumped, I was pushed overboard right there. There was no gate in. I didn't see the gate after that; it was knocked out of the way, at least it was not there when I got to it."

The testimony of Schwab is substantially corroborative of this. He says the gate had not been closed before the accident happened; "there was a man had hold of the gate. He had it in his hand and in the act of putting it in. The man was in the act of putting the gate in, about as the crowd came and pushed along."

As to the alleged standing order of the defendant not to start the boat until the gangway had been closed and secured after the hauling in of the gang plank, the evidence does not come up to the allegation. The evidence of Keller, a deck hand, was that the orders were to close the gangway as soon as the plank was hauled. He says nothing as to this being done before the boat started. He also says it would take two or three minutes to put in the gate and secure the gateway opening. Mr. Mull, the mate, said there was a general standing order to close the gate immediately upon hauling the gang plank. Mr. Scoville was clerk on board the boat, whose duty kept him in the office, where he sold tickets, and he had nothing to do with the running of the boat. He was called by the defendant, and upon his cross-examination by plaintiff's counsel, he said that he had always understood that one of the standing orders on the boat was that the gate must be closed and secured before the boat started, although he admitted that he had never heard the order given.

There cannot be said to be any proof that the order was to close and secure the gate before the steamer started.

Now, upon this evidence, which is at least as favorable to the plaintiff as any in the case, we are bound to say there is no proof of negligence on the part of the defendant.

It appears that as soon as the signal was given, the gang plank was hauled up and the boat started. Immediately upon the hauling up of the gang plank the mate started for the gate and brought it to the gangway opening and was in the very act of setting it in position when the man brushed by him and jumped. At this time the boat had only moved thirty-five or forty feet along the pier, and was about twelve or fifteen feet away from it, and yet in that brief period the mate had almost accomplished a secure shutting of the gate. To say that the boat should not have been allowed to move a foot from the dock until this gate had been thus securely fastened and the rail and stanchions placed in position, is to decide the matter in view of the facts which subsequently occurred, and not from the circumstances existing prior thereto. It was an accident which could not, as I think, have been reasonably anticipated. The attempt of a belated man to jump from the boat to the wharf immediately after the starting of the boat, his failure to reach the dock, and his consequent falling in the water; the cry of "man overboard," the instantaneous rush of a crowd of ordinary passengers towards the side of the boat whence the cry proceeded, and the shoving of the plaintiff overboard, altogether form such an extraordinary and

theretofore unheard of combination of circumstances that the failure to foresee their possibility and to guard against their happening cannot, in any fair or proper view of the subject, be called negligence. The mere fact that an accident of the kind has never before happened may not be enough to avert the charge of negligence. If it might reasonably have been anticipated, or if its occurrence would not, in the minds of reasonable men, be in the highest degree unlikely, if things were left in the condition then presented to them, the charge of negligence might be a proper one for the jury to pass upon. (*Dougan v. Champlain Transp. Co.*, 56 N.Y. 1 (1); *Hubbard v. City of Yonkers*, 104 N. Y. 434.)

But here is a case where an accident of the nature proved not only never happened before, but it resulted from causes which no human being up to that time could reasonably expect to occur.

In this view it is wholly immaterial whether the mate, when he heard the voice and turned around, did so for the purpose of letting the man through the opening, or only for the purpose of seeing what was being done, with a view to perform his own duty more intelligently. It was not to be anticipated that the man would make an ineffectual effort to jump to the dock and fall in the water, and that then all the other circumstances should occur which resulted in shoving the plaintiff overboard.

The accident, upon the proof in the case, looking at it in the most favorable light for the plaintiff, was the result of causes for whose existence no one was legally responsible.

The judgment should be reversed and a new trial ordered, with costs to abide event.

Among other New York cases relating to Accidents on Boats are the following :

Ferry Skiff Upset—Passengers Drowned :

BLACKWELL v. WISWALL, 24 Barb. 355 (1855), was an action for damages for death of passenger who was drowned while crossing river in defendant's ferry skiff. Defendant's demurrer being sustained, plaintiff appealed. Judgment on demurrer but with leave to plaintiff to amend complaint.

NORTON v. WISWALL, 26 Barb. 618 (1858), was an action for damages for death of passenger who was drowned by upsetting of defendant's ferry skiff while crossing river. Judgment for plaintiff for \$3,000 reversed, the court holding that a party who has license to run ferry, and who leases same to another person, who conducts

1. See abstract of this case on page 576, *ante*.

same independently of the lessor, is not liable for wrongful act or negligence of servant of lessee.

VERTORE v. WISWALL, 16 How. Pr. 8 (1858), was an action for damages for death of plaintiff's intestate, who was drowned while being carried across a river in one of defendants' ferry skiffs. Defendants demurred to the complaint on the ground that the facts did not constitute a cause of action in the lifetime of Wiswall, and if any cause of action did arise it died with said Wiswall, and did not survive against the defendants. The demurrer being overruled, the defendants appealed from the order to the General Term. Order affirmed. (The ruling as to survival of action was overruled in *Hegerich v. Keddie*, 99 N. Y. 259.)

Fall of Sleeping Berth on Steamboat:

In **TINNEY v. NEW JERSEY STEAMBOAT CO.**, 12 Abb. Pr. N. S. 1 (1872), judgment for plaintiff who was injured by fall of berth on steamboat was reversed, the damages, \$5,000, for temporary loss of sight in one eye, being excessive.

SMITH v. BRITISH and NORTH AMERICAN ROYAL MAIL STEAM PACKET CO., 86 N. Y. 408 (1881), was an action for damages for injury to plaintiff caused by the fall of berths on the steamboat, plaintiff, in trying to escape from danger, being thrown against an open door, and being subsequently put in a wet place. Judgment affirmed. Case in Superior Court reported in 14 J. & S. 86.

Injured on Ferryboat:

In **DORAN v. EAST RIVER FERRY CO.**, 3 Lans. 105 (1870), judgment for plaintiff, an infant, whose hand was injured by being jammed against ferry slip as boat was coming into the slip, affirmed.

In **GREGORY v. NEW YORK, LAKE ERIE & WESTERN R. R. CO.**, 55 Hun, 303 (1890), plaintiff was injured by falling into coal hole on one of defendant's ferryboats. Judgment for plaintiff for \$5,000 reversed on the ground of admission of incompetent evidence as to nature of injuries.

In **SCHINDLER v. NEW YORK, LAKE ERIE & WESTERN R. R. CO.**, 1 N. Y. State Rep. 289 (N. Y. City Court, 1886), judgment for plaintiff, a girl six years of age, who was injured by the gate on defendant's ferryboat, was reversed on the ground of want of care of the child's protectors, such want of care contributing to the accident.

Injured on Steamboat:

GARONI v. COMPAGNIE NATIONALE DE NAVIGATION OF MARSEILLES, 131 N. Y. 614 (1892), judgment for plaintiff affirmed, in action for damages for injuries to plaintiff, an infant, whose foot was crushed by rudder chain on the deck of defendant's steamship. Judgment for \$10,000. See case reported in Common Pleas, 14 N. Y. Supp. 797.

BRUSWITZ v. NETHERLANDS STEAM NAVIGATION CO., 64 Hun, 262 (1892), was an action for damages for injuries sustained by

plaintiff by falling over sockets fixed on floor of steamship to secure tables in dining saloon. Judgment for plaintiff for \$3,500 reversed, on the ground, among other grounds, of erroneous instruction that steamship company, as carriers, were bound to use utmost care and vigilance, it being held that carrier was only bound to use ordinary care where there was no question as to defective machinery.

In *HUGHES v. NEW JERSEY STEAMBOAT CO.*, 31 N. Y. Supp. 1012 (1895), judgment for plaintiff was reversed, where it appeared that plaintiff was injured by falling on stairs of defendant's boat, due to alleged slippery condition of same, his testimony not being corroborated, and defendant showing that stairs were in good order.

Injured at Ferry House :

O'REILLY v. LONG ISLAND R. R. Co., 4 App. Div. 139 (1896), was an action for injuries sustained by plaintiff, who, while passing from defendant's ferry house was injured by tripping over some boards used in course of repairs to ferry house. Judgment for plaintiff reversed, there being no evidence as to length of time obstruction was permitted to remain in front of ferry house.

In *KEILT v. STATEN ISLAND RAPID TRANSIT R. R. Co.*, 75 Hun, 579 (1894), it was held to be negligence for defendant to have a gate suspended above passageway to boat, which would fall so rapidly that it could not be controlled by the operator, and judgment for plaintiff for \$250, who was injured by such gate, affirmed.

OSBORN v. UNION FERRY Co., 53 Barb. 629 (1869), was an action for damages for injuries sustained by falling over a piece of timber outside the defendants' ferry house. On the motion of defendants the complaint was dismissed. On appeal by plaintiff new trial was granted, the court holding that it was the duty of defendants to furnish or keep lights, so that passengers going to or from their boats might, with ordinary care, have seen the timber.

Explosions on Boats :

In *CALDWELL v. NEW JERSEY STEAMBOAT Co.*, 47 N. Y. 282 (1872), judgment for plaintiff for \$20,000 was affirmed. It appeared that plaintiff was a passenger on defendants' steamboat "St. John," and as the boat was nearing its dock in New York, one of its boilers exploded, and plaintiff was scalded by steam and hot water and was maimed and crippled for life. Affirming 56 Barb. 425.

In *SWARTHOUT v. NEW JERSEY STEAMBOAT Co.*, 48 N. Y. 209 (1872), judgment for plaintiff for \$2,000 was affirmed. Plaintiff was injured by an explosion of a boiler on one of defendants' boats. Affirming 46 Barb. 222.

LANDERS v. STATEN ISLAND R. R. Co.; *MADDEN v. STATEN ISLAND R. R. Co.*; *KELLY v. STATEN ISLAND R. R. Co.*, 53 N. Y. 450 (1873), three actions to recover damages for deaths of plaintiffs' intestates, caused by the bursting of a boiler on one of defendant's ferryboats. Judgments for plaintiffs reversed on the ground of want of jurisdiction in the City Court of Brooklyn. Reversing 13 Abb. Pr. N. S. 338.

In *CARROLL v. STATEN ISLAND R. R. Co.*, 58 N. Y. 126 (1874), where plaintiff was injured by the explosion of a boiler on one of defendant's ferryboats, judgment for plaintiff was affirmed. Affirming 65 Barb. 32.

In *LEONARD v. COLUMBIA STEAM NAVIGATION Co.*, 84 N. Y. 48 (1881), plaintiff's intestate was killed by an explosion of a boiler of defendant's steamer within the boundaries of the State of Connecticut. Judgment for plaintiff affirmed.

In *EGAN v. NEW JERSEY STEAMBOAT Co.*, 86 Hun. 542 (1895), judgment for plaintiff who was injured by the explosion of inflammable freight on defendant's boat, was reversed, it being held that in order to recover damages for violation of statute prohibiting carriage of dangerous articles on boat carrying passengers, plaintiff must show intentional violation of statute on defendant's part. Affirmed in 154 N. Y. 777.

In *ERICKSON v. SMITH*, 38 How. Pr. 454 (1869), plaintiff's intestate was killed by falling overboard in trying to escape injury from an explosion of a boiler on one of defendant's boats. Judgment for plaintiff for \$3,000 affirmed.

AMONG NEW YORK CASES RELATING TO ACCIDENTS ON STAGE COACHES ARE THE FOLLOWING :

In *COON v. KNAP*, 8 N. Y. 402 (1853), judgment for plaintiff for \$340 damages for broken leg caused by overturning of stage coach in which she was a passenger, was reversed, on the ground of error in admission of parole evidence as to accord and satisfaction. See also 13 How. Pr. 175.

In *CALDWELL v. MURPHY*, 11 N. Y. 416 (1854), judgment for plaintiff for \$625, damages for injuries sustained in overturning of stage coach, affirmed. Affirming 1 Duer, 233.

In *BUFFETT v. TROY and BOSTON R. R. Co.*, 40 N. Y. 168 (1869), where plaintiff's shoulder was injured by the overturning of one of defendant's stage sleighs on which he was a passenger, judgment for plaintiff for \$450 damages was affirmed. The court held that a railroad company carrying passengers by conveyances other than trains owes the same duty of care to passengers as on trains. Affirming 36 Barb. 420.

In *SPOONER v. BROOKLYN CITY R. R. Co.*, 54 N. Y. 230 (1873), judgment of nonsuit reversed in action for damages for injury to plaintiff who was riding on footboard of defendant's stage sleigh and collided with another sleigh, it being held not negligent for passenger to ride on footboard, if carrier allowed passengers there. Reversing 36 Barb. 217, which affirmed 31 Barb. 419.

DUTY OF RAILROAD COMPANY TO REMOVE SNOW FROM STATION PLATFORM.—A railroad company is bound to remove snow and ice from a platform over which it is necessary for passengers to pass in order to reach the cars, or to cover the

same with ashes or other substance, and the obligation is not fulfilled by the appointment of servants whose duty it is to keep the platform in a safe condition when the servants neglect the duty.

FALLING ON ICE ON STATION PLATFORM—NEGLIGENCE.—A passenger who assumes that the corporation has performed its duty and that the platform is safe, is not guilty of contributory negligence in going upon the platform to reach the cars, and may recover damages for injuries received from a fall on the platform. So held in an action to recover damages for injuries sustained by falling upon an uncovered platform between a waiting room, on defendant's road and its cars, over which it was necessary for passengers to pass to reach the cars; which platform plaintiff alleged defendant had negligently suffered to become covered with snow and ice, rendering passage over it insecure and dangerous. Judgment for plaintiff affirmed. *Court of Appeals, New York, March, 1878. Weston v. New York Elevated Railroad Company, 73 N. Y. 595, affirming 42 Super. Ct. (J. & S.) 156.*

DOBIECKI v. SHARP, RECEIVER.

Court of Appeals, New York, February, 1882.

[Reported in 88 N. Y. 203.]

KILLED ON PLATFORM OF STATION BY EXPRESS TRAIN WHILE WAITING FOR LOCAL TRAIN.—In an action to recover damages for causing the death of plaintiff's testator, where it appeared that he desired to take passage on a local train and crossed the tracks of the railroad in front of an approaching train to a platform constructed for the accommodation of passengers about to take local trains, and after reaching the platform and while standing there was struck by a car that projected from three to five inches over the platform, and was killed, and the train to which the car was attached was an express and did not stop at the platform, the questions of negligence and contributory negligence were properly submitted to the jury and it was not to be assumed without proof that he must have known that the platform was for a train which he did not intend to take, so that he was negligent in being there.

PASSENGER WAITING ON PLATFORM.—Under ordinary circumstances a traveller would be justified in going upon a platform erected for the accommodation of passengers and in waiting there to take any passing train.

"**APPEAL** from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 15, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

"This action was brought to recover damages for alleged negligence, causing the death of Wladislaus Dobiecki, plaintiff's testator.

"The defendant was at the time of the accident operating the railroad of the Long Island Railroad Company, which ran through Atlantic avenue, in the city of Brooklyn. Two kinds of trains were run upon the avenue, express or through trains, which made no stops on the avenue, and trains for local business, called rapid transit trains. For the accommodation of passengers taking these local trains, platforms had been erected in the street on each side of the railway. The deceased was struck by an express train and killed. After the train was in sight he crossed the track in front of it to one of these platforms, and as plaintiff's evidence tended to show, had reached and was standing upon the platform when he was struck. The evidence upon this point was conflicting, defendant's evidence tending to show that he was struck by the engine before he reached the platform. It appeared that the cars of the passenger train projected over the platform from three to five inches. The court charged in substance that unless the jury were satisfied that the deceased was overtaken by the train before he had crossed the track, and before he had secured himself on the other side, either on the platform or elsewhere, there was negligence on his part which would prevent a recovery; but if the deceased stood upon the platform where he had a right to stand, and where he could, apparently, stand in safety, and not knowing the fact of this projection, the widening of the car—suppose that he stood at the edge of the platform, and standing there he was carried away on account of this projection, then of course the injury would be caused by that, and that is a question for you to determine. Was he standing there on the edge of the platform, and was that the way the injury happened? If so, then we find one cause of the accident, at least one assistant cause, in the improper construction; for it was improper so to construct it, having reference to this platform. Plaintiff's counsel requested the court to charge that 'if the jury believe the deceased was standing on the platform as the train approached and with the knowledge of its approach placed himself in such a position as to be struck by the train, the plaintiff cannot recover.' This request was refused, and said counsel excepted." *Judgment affirmed.*

EDWARD E. SPRAGUE, for appellant.

SAMUEL HAND, for respondent.

Miller, J.—The first question to be determined in considering this case is the alleged negligence of the defendant. The claim in this respect is that the cars were so constructed as to project over the edge of the platform from three to five inches, and that this was

the cause of the testator's death. That they did so project is not questioned, although there is some discrepancy in the testimony as to the extent of the projection. Assuming that they did extend beyond the platform to the smallest extent proven, and in this form may have caused the death of the deceased or injured persons upon the platforms, some evidence was presented that the cars were improperly constructed, and it was a question of fact for the jury whether this was negligence on the part of the defendant. The fact that the platform in question was not connected with a depot and merely for the accommodation of a certain class of passengers in stepping off and on the cars, does not exonerate the defendant from liability unless it is entirely apparent that the deceased was improperly there or was himself negligent, for even conceding that it was made for the specific purpose named, it was one of the questions to be determined by the jury from the evidence whether the deceased was properly there. Under ordinary circumstances a traveller would be justified in going upon a platform erected for the accommodation of passengers and in waiting there to take any passing train. It is not to be assumed, without proof, that the deceased must have known that the platform was for a train which he did not intend to take and that he was negligent in being there. The contention that the plaintiff was bound to show something more than an improper construction of the platform or cars, and that she was bound to prove that this negligence was the cause of the injury is sufficiently answered by the remark that some of the evidence tended in that direction. There were marks of blood on the platform. The satchel, hat, and umbrella of the deceased were found there and his body lay about five feet west of the platform. From these and other circumstances, and in view of the facts it may have been a legitimate inference that the death of the testator was caused by the negligence of the defendant. We, therefore, think that there was no error committed in refusing the motion of the defendant for a nonsuit upon the ground that the testimony failed to establish any negligence of the defendant. The question raised on the motion for a nonsuit as to the contributory negligence of the deceased was also for the jury. There was conflicting evidence to be weighed and reconciled in regard to the conduct of the deceased, and as to whether he was struck while crossing the railroad track or while on the platform. There was proof showing that he had crossed the track in front of the train and reached the platform when it is claimed he was struck. In view of the finding of the jury the testimony as to this fact is entitled to the most favorable construction for the plaintiff, and

being there it is not to be assumed as a fact that he placed himself in a dangerous position which necessarily established contributory negligence. The claim of the appellant's counsel that the deceased was chargeable with knowledge of the draft of an express train while passing, and was precluded from a recovery by not placing himself beyond the line of danger, is not well founded. While he had no right to expose himself to danger by making close calculations as to the speed of the train by taking any unusual risks, it by no means follows because he was upon the platform at this time he was there without right and was chargeable with contributory negligence.

We think he had a right to be upon the platform for the purpose of prosecuting the journey he had started to take. It was erected for the accommodation of travellers, and they have a right to assume that they may be there without being exposed to unnecessary hazard or danger. *Brassell v. N. Y. C. & H. R. R. Co.*, 84 N. Y. 241; *Weston v. N. Y. El. R. R. Co.*, 73 N. Y. 595 (1). They are invited to come there, and so far as is necessary to remain for the purpose of travelling in the cars. As a matter of course they are bound to be careful and cautious in not exposing themselves to needless danger, and they would not be free from negligence if while a train was passing they unnecessarily placed themselves in a position to be struck and injured by it. They must employ reasonable care and circumspection in their conduct while there, and if they fail to do this they have no redress if injuries occur. The cases cited by the defendant's counsel to sustain the position that the company is not liable under circumstances like those here presented are not analogous, as will be seen by an examination of the same. In *Rigg v. M. S. & L. R. Co.*, 12 Jurist, Part 1, (N. S.) 525 (2), the injury was caused by the deceased while under a temporary infliction caused by himself. He was running arm and arm with a companion in a footway by the side of the railroad to catch the train, and caught his foot in the interstices between the planks of which the footway was made, and both himself and his companion fell over on the rails

1. See abstract of this case on page 587, *ante*.

2. In *Rigg v. Manchester, Sheffield & Lincolnshire R'y Co.*, 12 Jur., N. S. 525, it appeared that a railway company had a platform, extending from their station to their steamboat pier on a river, four feet three inches in width. On one side the platform was protected by railings, but on the

side next the railway, which ran parallel with it for some distance, there was a guard of wood nine inches high. In an action against the company for the injury of a passenger, two witnesses stated they considered it a dangerous platform. Held, that this was merely an expression of opinion, and that there was no evidence of negligence.

as the train came in. The deceased was killed and his companion saved himself with great difficulty. The platform was too narrow for two to walk abreast, and the condition of the parties, who had been drinking freely, prevented the exercise of due care and caution. It was held that the railroad company was not negligent and no recovery could be had. The question was different from the one now considered, and the case cited is not in point. In *Watkins v. Great Western R. Co.*, 37 L. T. (N. S.) 193 (1), a railway porter was standing on a plank in broad daylight thrown across from parapet to parapet of a footbridge connecting the two platforms of a station, cleaning a lamp, when the plaintiff, accompanying her daughter to a train, in crossing the bridge struck her head against the plank and was injured, and it was held that the plaintiff could not recover. It was said by DENMAN, J., that the obstruction was one which the plaintiff could have seen if she had not been walking with her eyes toward the ground. That the accident did not happen owing to any breach of duty on the part of the defendant, but solely owing to the unfortunate circumstances that the plaintiff walked with her eyes on the ground instead of looking before her. The contributory negligence of the plaintiff was very obvious in the last case cited, and the case has no bearing upon the question now considered. It is not insisted as we understand, in the case considered, that inasmuch as the deceased was standing on a railroad platform he was entitled to absolute protection upon every part of it, and not bound to look out for himself. There was proof tending to show that he had reached the platform after crossing the railroad track and then was struck by the passing train. It is perhaps a close question whether he was negligent, but in view of all the evidence it was, we think, a fair question for the jury to determine whether he was chargeable with contributory neglect, and their determination that he was not cannot be regarded as a matter of mere conjecture or speculation, but might have been reached after a fair and full consideration of all the evidence. It follows that there was no error in

1. In *Watkins v. Great Western R'y Co.*, 37 L. T., N. S. 193, it appeared that a railway porter was standing, in broad daylight, upon a plank thrown across from parapet to parapet of a footbridge connecting the two platforms of a station, cleaning a lamp, when the plaintiff accompanying her daughter to a train, in crossing the bridge, struck her

head against the plank and was injured. Held, that the plaintiff was not a mere licensee; but that there was no evidence of negligence on the part of the railway company. Held also, the question whether there was, or was not, negligence on the part of the company should have been left to the jury.

denying the motion for a nonsuit upon the ground last considered.

The request to charge the jury: "That if the jury believe that the deceased was standing on the platform as the train approached, and with knowledge of its approach, placed himself in such a position as to be struck by the train, the plaintiff cannot recover," was properly refused. It was covered by the charge made, and the request, if granted, would have required the deceased not only to exercise proper care and vigilance, but to guard against the improper construction of the defendant's cars, of which he had no knowledge. If he had been out of the reach of the cars if constructed in the usual manner, under the request the company would be exonerated from negligence arising from the defective construction which it is claimed caused the testator's death. No such vigilance is demanded by the law.

The request made to charge that there was no presumption of law that the deceased exercised a proper care at the time of the accident was also covered by the charge as made, and a repetition of it was not required.

There was no error upon the trial, and the judgment should be affirmed.

CARPENTER V. BOSTON AND ALBANY RAILROAD COMPANY.

Court of Appeals, New York, December, 1884.

[Reported in 97 N. Y. 494.]

MAIL BAG THROWN FROM CAR ONTO STATION PLATFORM AND PASSENGER INJURED.—Where plaintiff, a passenger waiting at defendant's station to board train, was struck by a mail bag thrown from the mail car as the train passed the station platform, and the defendant knew of the practice of mail bags being thrown from the car onto the platform, it was held that a cause of action was established against the defendant, as it was an omission of its duty towards its passengers to protect them from danger, and judgment of nonsuit was reversed (1).

APPEAL, from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 2, 1882, which affirmed a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial.

"Plaintiff, desiring to take passage on defendant's road, and

1. *Reversing* 24 Hun, 104; 14 N. Y. Weekly Dig. 517.

having purchased a ticket, went out on the platform of the depot at Chatham village, waiting for an approaching train. The train had a postal car attached, ahead of the passenger cars. As said car passed the platform a heavily-loaded mail bag was thrown therefrom by the postal clerk or agent in charge, and struck plaintiff who was walking along the platform toward the passenger cars, inflicting serious injuries." Further facts appear in the opinion. *Judgment reversed.*

CHARLES L. BEALE, and ROBT. E. ANDREWS, for appellant.

JOHN CADMAN, for respondent.

Danforth, J. — The plaintiff was injured before the actual commencement of his journey, but he was lawfully on the platform because he was a passenger, and was approaching the train, as the defendant concedes, "in the usual and ordinary way," to enter the car in which he had purchased a right to travel. The law in such a case is well settled. It imposes an obligation on the railroad company to take reasonable care that a person holding that relation to it shall, while on its premises, be exposed to no unnecessary danger or one of which it is aware, and requires it to provide for him a safe passage to the train. It is obvious that was not done in this case. The plaintiff was knocked down and severely hurt, by a loaded mail bag thrown from the postal car while the train was in motion, and the only answer to his demand for compensation is that the missile was negligently thrown by the person in charge of the mail car, an employee or servant of the United States, and not of the company; that he was an independent agent, and hence, the defendant says, it is not liable for his act. In support of this contention its learned counsel cited *Nolton v. Western R. R. Co.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 N. Y. 313 (1); *Penn. R. R. Co. v. Price*, 23 Alb. L. J. 69 (2), and *Putnam v. Broadway, etc., R. R. Co.*, 55 N. Y. 113 (3).

I am unable to give to those cases that consequence. The Pennsylvania case (reported in 96 Pa. St. 256), was an action against a railroad company for damages for the death of a postal clerk, caused by a collision. A recovery was denied, but the question turned solely upon the construction of a statute of that State. It has no application here. But if it had, the decision is directly opposed to that of this court in cases also cited by the respondent,

1. Notes of these cases appear in *vania* cases in 10 Am. Neg. Cas. this volume, *post*.

2. Reported with the *Pennsylv-* 8 Am. Neg. Cas. 553.

3. There is a note of this case in

viz: *Nolton v. Western R. R. Co.* and *Blair v. Erie R. Co.*, *supra*, in each of which a recovery was had on the ground that the defendant owed a duty to the person injured (in one case a postal clerk and in the other an express agent), and neglected to perform it. That principle we think the plaintiff may also successfully invoke, and find support in the other case (*Putnam v. Broadway, etc., R. R. Co. supra*), cited by the respondent.

It was there held, in substance, that a railroad company was bound to exercise the utmost vigilance not only in guarding its passengers against careless interference by others, but even against violence, and if in consequence of neglecting this duty he receives injury, which in view of all the circumstances might have been reasonably anticipated, it is liable. The defendant prevailed in that case on the ground that the mischief was one which it had no reason to expect, and so was under no obligation to guard against. But if it had been made to appear that he who made the assault was vicious and accustomed under similar circumstances to do hurt, and the defendant had been notified of the fact, a duty would, as the case also holds, have been imposed upon it either to remove him from the car, or inform its other passengers of their danger, and failing to do so would be responsible for such harm as he occasioned. To the same effect is *Muster v. C. M. & St. P. Ry. Co.*, 21 N. W. Rep. 223. There the plaintiff was at work for the defendant at its depot, standing on a scaffold erected by it; the defendant's train, of which a mail car formed part, ran past, and a mail bag thrown from it by a postal agent struck the leg of the scaffold with such force that it fell and the plaintiff was injured. He failed in his action. Upon appeal, the court, in answer to the claim that the defendant was negligent in not informing the plaintiff of his peril, said: "All the evidence on that subject is to the effect that the mail bag was usually discharged near the mail catcher, which was two hundred feet west of the depot, and there is no testimony whatever that it had ever before been thrown off at the depot," adding: "the company is not chargeable with notice that it was likely to be thrown off at the depot, and hence was not required to guard, by notice or otherwise, against an accident to the plaintiff resulting from its being thrown off there on the occasion in question." In such cases no doubt *scienter* is the gist of the action, and in those cited it was lacking. In the one before us, it was clearly established. The defendant constructed the postal car and owned it. It was occupied under defendant's permission, for a certain use, and it may be conceded that there was nothing in the nature of that use to

require the defendant to expect that the contents of the car would be violently cast upon the platform while the train was in motion, and before the passengers thereon could reach the cars. Had this accident, therefore, happened on the first passage of the car, the defendant might be excused as in the case cited, on the ground that the mere act of the postal clerk in throwing off the mail bag at that place without the previous knowledge of the defendant of his intention to do so, was not negligence on its part.

But the fact is quite otherwise. The practice which led to the accident was a familiar and usual one. It was proven by uncontradicted evidence that this method of discharging mail bags from the postal car, upon the platform provided for passengers, and while they were upon it and exposed to injury, had prevailed for a long time, under circumstances from which notice to the defendant might be fairly implied, and with the actual knowledge of the defendant's agents, in whose presence the act was frequently, if not daily performed, and so far as appears without the slightest objection on their part. They were, therefore, chargeable with notice that the mail bag was likely to be thrown off in the same manner and under the same circumstances at any arrival of a postal car. By this knowledge the defendant was brought fairly within the rule which enjoins care, not only on the part of itself and its servants, but also like care in preventing injury from the careless or wrongful act of any other person whom it permits to come upon its premises.

The occupants of the postal car are no exception to this rule; they were not strangers or uninvited. They came under a contract voluntarily made by the defendant and which secured the carriage and delivery of the mails upon such conditions as it imposed or acceded to. Its police power extended over the persons employed in it, while they were on the defendant's track or at its stations, certainly not to interrupt them in the discharge of their official duties, but so far as practicable to prevent injury to those for whose safety it was bound to provide. So it was held in *Stewart v. Brooklyn and Cross Town R. R. Co.*, 90 N. Y. 588 (1), applying the rule to violence committed by strangers and copassengers, in *Flint v. Norwich & N. Y. Trans. Co.*, 34 Conn. 554 (2), to violence from whatever source arising, and this although the aggressors were soldiers received upon the boat on compulsion. The doctrine of

1. *Stewart v. Brooklyn & C. T. R. R. Co.*, 90 N. Y. 588, is reported in 8 Am. Neg. Cas. 547.

2. *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554, is reported in 8 Am. Neg. Cas. 103.

that case is approved and its reasoning followed in the case of Putnam, *supra*.

Nor was it necessary in order to charge the defendant with the duty of care and vigilance, that on some former occasion a like injury had happened. The act was itself dangerous. There was, under the circumstances of which the defendant had notice, a natural and probable connection between the act of throwing out a mail bag with its contents and the injury which actually happened. It could have been foreseen, and the defendant owed a duty to those who might probably be on the platform, either to prohibit the practice which made the place dangerous, or exclude the passenger until train time, or provide some other way for ingress to the cars, or at least give notice to him that he must take care and avoid the danger, or in some other way use reasonable caution to prevent damage from the danger, of which it knew or ought to have known. Whether such reasonable care was taken, by notice, guarding the way, or otherwise, must be determined as a matter of fact. So far as the case now discloses, the defendant failed to do either of these things. It seems to me, therefore, that the plaintiff's evidence tended to establish every proposition which, as set forth in his complaint, constituted a fair cause of action—damages occasioned by the omission of duty which the defendant owed to him, and that he was not himself in default. These were questions for the jury and should have been submitted to them. The plaintiff was, therefore, improperly nonsuited.

It follows that the judgment of the Special and General Terms should be reversed and a new trial granted, costs to abide the event.

Judgment reversed. All concur, except RAPALLO and FINCH, J. J., dissenting.

NEGLIGENCE—BURDEN OF PROOF.—In an action for negligence the burden of proof is upon the plaintiff to show that the injury complained of was caused by the defendant, not in part, but solely.

INJURED WHILE STANDING ON STATION PLATFORM BY MOVING TRAIN.—Where it appeared that the plaintiff alighted at a station used in common by the company from whose train he had alighted and by the defendant company, and never having been there before, he followed a number of other passengers out of the depot onto a platform running along its side; that one of the defendant's tracks ran outside of the depot along this platform and so close to it that the cars overlapped it two or three inches or more according to the oscillations of the cars while moving on the track; that after a cabman had been engaged by the plaintiff

and had taken part of his baggage to the cab a few feet away, a train moving rapidly over the track which the cabman had just passed swept the plaintiff from the platform and seriously injured him; that it was a dark, hazy evening and the plaintiff did not see the track or know that it was there, and neither he nor the cabman saw the train or heard it approach, nor heard any bell or whistle, it was held that there was sufficient evidence to sustain a verdict for the plaintiff, and that it was negligence to bring without notice a train at such speed up to a station and so near a platform provided for passengers.

PHOTOGRAPH ADMISSIBLE IN EVIDENCE.—A photograph of the *locus in quo* of an accident, if a fair representation, is admissible in evidence the same as a map or other diagram. *Judgment for plaintiff affirmed. Court of Appeals, New York, October, 1887. Archer v. New York, New Haven and Hartford Railroad Company, 106 N. Y. 589.*

FALLING ON ICY STAIRWAY LEADING FROM STATION.—In an action for injuries sustained by falling while descending a stairway leading from defendant's station where it appeared that the accident happened about half past five in the morning, that there had been a storm of sleet and snow from midnight to about four A. M., that the stairway had a cover that projected a foot each side and had hand rails and was inclosed up to the rails on each side, and each step had a piece of rubber upon it to prevent slipping, and the court charged that it was the legal duty of the defendant to use all human care, caution and skill to make the ingress and egress to its station safe; that defendant was required to use all the skill, diligence and care a very cautious human being would use if he were looking after his own life and health, that if the jury came to the conclusion that the steps were slippery at that time and that means might have been taken to prevent them being so, and if by reason of their slipperiness the fall occurred, then the defendant was guilty of negligence, it was error, as a less degree of care was required of a railroad company regarding the approaches to its cars than in regard to the roadbed, machinery and construction of its cars, and the company was only bound to exercise ordinary care in view of the dangers to be apprehended, and it was not negligent in failing to throw on the steps ashes or sawdust or something similar during the storm or after it stopped and before the accident happened, and a nonsuit should have been granted. So held in action to recover damages for an accident resulting in death of plaintiff's intestate, alleged to be due to defendant's negligence. *Judgment reversed. Court of Appeals, New York, March, 1889. Kelly, Adm'x, v. Manhattan Railway Company, 112 N. Y. 443 (1).*

1. The court distinguished *Weston v. N. Y. Elev. R. R. Co.*, 73 N. Y. 595 (9 Am. Neg. Cas. 587, *ante*), holding that that case did not con-

trol the case at bar, the facts in the *Weston* case being materially different.

AINLEY v. MANHATTAN RAILWAY COMPANY.

Supreme Court, New York, First Department, January, 1888.

[Reported in 47 Hun, 206.]

PASSENGER INJURED BY SLIPPING ON ICE ON STAIRS OF ELEVATED RAILROAD STATION.—In an action for damages sustained by the plaintiff through the loss of the society and services of his wife and to recover expenses incurred for her benefit in consequence of her being injured by slipping on some ice on the stairs of an elevated railroad station which she was leaving after alighting from a train, where the evidence tended to show that there had been a snow the day before the accident occurred and that the day she fell it had thawed in the middle of the day and that the drippings from the roof fell upon the stairs and towards night froze and became slippery and that no ashes or sand were sprinkled on the steps to prevent slipping, although they had been upon the platform, and that the day before the accident the stairs had been in about the same condition, the company was liable.

HUSBAND ENTITLED TO DAMAGES FOR LOSS OF SERVICES OF WIFE.—A husband is entitled to recover damages against a party who unjustly deprives him of the assistance and society of his wife whether the deprivation has been the result of negligence of the party or otherwise.

APPEAL from a judgment in favor of the plaintiff entered upon the verdict of a jury. The facts appear in the opinion. *Judgment affirmed.*

HUGH L. COLE, for appellant.

TEN EYCK & REMINGTON, for respondent.

Van Brunt, P. J. — Most of the argument, as contained in the appellant's brief, is to the effect that, although no exceptions were taken, yet substantial errors to the prejudice of the appellant having been committed by the learned justice who presided at the trial in the submission of the case to the jury, it is the duty of this court to award a new trial. Whatever might have been the power and duty of this court, had there been in this case entered an order denying a motion for a new trial and an appeal therefrom, there being no such order or appeal in the record before us, and the only appeal taken being from the judgment, we are limited to the consideration of the exceptions taken during the trial.

This action was brought to recover damages alleged to have been sustained by the plaintiff through the loss of the society and services of his wife and to recover expenses incurred for her benefit in con-

sequence of her being injured by slipping on some ice at one of the appellant's stations, which she was leaving after having been a passenger upon the appellant's cars. It was alleged that the appellant had been guilty of negligence in allowing snow and ice to accumulate and become slippery upon the stairs of the station, in consequence of which the plaintiff slipped and fell.

The main question involved in this appeal is raised by the exception to the denial of a motion to dismiss the complaint upon the ground that there was no evidence to establish negligence upon the part of the appellants or to make out any cause of action in favor of the respondent. In the consideration of this question, it is entirely immaterial whether the law requires the appellant, being a carrier of passengers, to use the highest degree of diligence to make their platforms and the approaches thereto safe, convenient, and useful, or whether the appellant, in respect thereto, is simply bound to exercise ordinary care, in view of the dangers attending their use, to make them reasonably adequate for the purpose to which they are devoted; because, adopting the rule the most favorable for the appellant, there was sufficient evidence to justify the jury in finding that ordinary care had not been used to make the steps of their station on which the accident happened reasonably safe for use, and, therefore, the motion to dismiss was properly denied. The evidence tended to show that there had been a snow the day before the plaintiff's wife fell; that the day she fell it had thawed in the middle of the day; that the drippings from the roof fell upon the stairs, and towards night froze and became slippery, and that no ashes or sand were sprinkled on the steps to prevent slipping, although they had been upon the platform, and that the day before the accident the stairs had been in about the same condition.

If the jury believed this evidence, they were justified in finding that reasonable care had not been used in the maintenance of their platform and approaches. The duty of the appellant was at least to maintain and keep these stairs in a reasonably safe condition for the purposes to which they were devoted; and to allow snow and ice to accumulate thereon so that they became slippery and dangerous for passengers to descend is not a fulfillment of that duty. The degree of care to be exercised necessarily depends upon the circumstances of each individual case, because the hazards to be provided against may be greater in one case than in another.

The public in entering upon and departing from the stations of the appellant, has at least the right to assume that they are kept reasonably safe for use, and are not bound to be on their guard for

extraordinary perils, and therefore use extraordinary diligence. If the appellant allows its stairs to become so coated with ice that they are dangerous to be used by the passengers whom they invite to use the accommodations which it furnishes to the public, the appellant does not perform the duty which is imposed upon it by law and is liable for any injuries resulting therefrom to its passengers, unless there has been contributory negligence.

The appellant also claims that the learned judge erred in charging the jury that the plaintiff was entitled to recover for the loss of the society of his wife, and claims that the only cases in which this element of damage is allowed to be considered by the jury are actions of seduction "where the defendant has run away with the wife and has actually deprived the plaintiff of her company." We are not aware that the rule is thus restricted. The rule is that if the husband is entitled to the assistance and society of his wife, he is entitled to recover damages against a party who unjustly deprives him of such assistance and society; and there does not seem to be any reason, if the fact exists that he has been deprived of such assistance and society by the act of another, why he should not recover as well where such deprivation has been the result of the negligence of the defendant as where such deprivation has been caused by the enticing away of the wife.

The only other exception necessary to consider is the objection to the reading of the cross-examination of two witnesses whose evidence was taken upon another trial. It would appear that the reading of the testimony of these witnesses taken upon another trial has been consented to by the appellant, and if such were the fact the respondent had the right to read the whole or any part of the evidence. He was not restricted to the direct examination, nor need he read the whole of such examination. The whole of the testimony, so far as relevant, was open to both parties and they could read that which they saw fit.

The exceptions not being well taken, the judgment should be affirmed, with costs.

LYCETT V. MANHATTAN RAILWAY COMPANY.

*Supreme Court, Appellate Division, First Department,
December, 1896.*

[Reported in 42 N. Y. Supp. 431.]

PASSENGER FALLING OVER WORKMAN ON STAIRWAY LEADING TO ELEVATED RAILROAD.—Where plaintiff, a woman 49

years old, was climbing the stairs leading to an elevated railroad station for the purpose of taking passage on one of defendant's trains, and before she reached the top of the stairs she stumbled over a man who was posting bills, and was injured, the facts warranted submission of case to the jury and judgment of nonsuit reversed.

APPEAL from Trial Term, New York County. The facts appear in the opinion. *Judgment reversed.*

SAMUEL H. RANDALL, for appellant.

JOSEPH H. ADAMS, for respondent.

Ingraham, J.—The plaintiff, a woman 49 years old, going to take one of the trains of the defendant railroad, having mounted the stairs leading to the depot, and about four feet from the head of the stairs, fell over a man who was putting up a poster on a sign board at the entrance of the defendant's station. This man appears to have been between the top of the stairs and the ticket office, where the plaintiff was obliged to purchase her ticket before entering the train. There was evidence tending to show that the man was kneeling down at the time, his legs extending over the passageway, although the man himself was called as a witness, and testified that he was not kneeling, but was standing up. The plaintiff swore that she did not see the man, but in some way was thrown suddenly upon a metallic pot that he was using at the time, and was injured. At the close of the case the court dismissed the complaint, and from such dismissal the plaintiff appeals. We think this case should have been submitted to the jury. The plaintiff, seeking to become a passenger upon the defendant's railroad, was using the means supplied by the defendant to enable passengers to approach its ticket office to purchase a ticket, as required of passengers before entering the train. The defendant was bound to exercise ordinary care to make the approach reasonably safe, so that passengers using it would not be injured; and whether it allowed such passageway to become unsafe in consequence of defective appliances or in consequence of an obstruction placed there was immaterial. To allow either one of its employees or the employee of another, working upon the premises with its assent, to so obstruct this passageway that one using it would trip over him and fall, was certainly not a performance of this duty. Questions of this character have been many times before the court, and it had been universally held that any obstruction upon a railroad station, placed or permitted to exist there, and which rendered the approach to the station dangerous, was negligence. The obligation of a railroad company as to the

construction and maintenance of its stations and platforms is stated in *Lafflin v. Railroad Co.*, 106 N. Y. 139 (1).

"It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted."

Applying this rule, it is apparent that if this defendant either authorized or permitted a person to stand or kneel in such a narrow passageway, through which all of its passengers were obliged to go to get upon its cars, in such a way that his limbs extended across the passageway, and persons approaching the station were liable to trip over them, they were not using ordinary care to make such passageway reasonably safe for the purpose for which it was intended; or, at least, it was a question for the jury to determine, whether or not the defendant did exercise such care as to permit this passageway to be so obstructed.

We also think the question as to the plaintiff's contributory negligence was a question for the jury. She was walking on this passageway, which she had a right to assume was reasonably safe for the purpose of approach to the ticket office. She was looking in her pocket for money to pay her fare. Such payment of fare is required by the railroad company before entering a car, and a person cannot, as a matter of law, be said to be negligent while attempting to provide money to meet the requirements of the defendant, so that her attention was diverted from the floor on which she was walking. It would be manifestly impossible for a person approaching such a station to keep his eyes constantly upon the floor, to see whether or not the defendant has placed such obstructions in the passageway as to make the use of it dangerous. Whether or not the plaintiff did exercise the care of a prudent person under the circumstances, in approaching this ticket office, is a question for the jury.

We think, therefore, that the nonsuit was error, and that the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

1. *Lafflin v. Buffalo & S. W. R'y Co.*, 106 N. Y. 136, is reported in 5 *Am. Neg. Cas.* 268.

AMONG OTHER NEW YORK CASES RELATING TO ACCIDENTS AT STATIONS ARE THE FOLLOWING :

Platform out of Repair :

IN *CLUSSMAN v. LONG ISLAND R. R. Co.*, 9 Hun, 618 (1877), plaintiff was injured while going from the defendant's car over one of their station platforms to send a telegram from an office in the station. The platform was out of repair, and one of the planks not being properly fastened, plaintiff's ankle was injured. On the trial there was judgment for plaintiff, which, on appeal, was affirmed. The Supreme Court held that a railroad company, having a telegraph office in one of its stations open to the public, is responsible to passenger injured through their negligence, while going to the office over their structure or platform, by which it is accessible. (Affirmed in 73 N.Y. 606.)

See also *LISCOMB v. NEW JERSEY R. R. Co.*, 6 Lans. 75; *MACLENNAN v. LONG ISLAND R. R. Co.*, 20 J. & S. 22; *AYRES v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 77 Hun, 414.

Station Sidewalk out of Repair :

IN *BATEMAN v. NEW YORK CENTRAL AND HUDSON RIVER R. R. Co.*, 47 Hun, 429 (1888), plaintiff injured her ankle by stepping into a depression on the sidewalk leading from defendant's depot, she having alighted from one of defendant's trains and was leaving the depot. Judgment for plaintiff affirmed.

Torpedo Explosion :

IN *SMITH v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 78 Hun, 524 (1894), an action for injuries to plaintiff's leg caused by an explosion of torpedoes at a station, due to alleged negligence of defendant's station agent, it appeared from the evidence that plaintiff was standing upon the platform of the station; that a train known as the local freight had arrived, stopped, switched some cars, and was about starting on its way when the defendant's station agent stepped out and placed two torpedoes upon the track under one of the freight cars in the central part of the train, and then ran back to the station house. The train had just begun to move, and as the rear wheels of the freight car passed over the torpedoes an explosion occurred, causing some sharp fragment to pierce the plaintiff's leg, inflicting a serious injury. The plaintiff first testified that the train did not stop after the explosion, but continued on its way, but he subsequently testified that it did stop for a time. But no evidence was submitted showing that any communication took place between the station agent and the persons in charge of the train thereafter. The Supreme Court held that plaintiff had failed to show that the station agent was acting within the scope of his employment in exploding the torpedoes, and the defendant would not be liable unless the explosion was caused in the performance of his duty. Judgment of nonsuit affirmed.

See also *KIRBY v. DELAWARE & HUDSON CANAL Co.*, 90 Hun, 588.

Crossing Track at Depot :

In *HEMPENSTALL v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 82 Hun, 285 (1894), it appeared that plaintiff was struck by a freight car that was moving slowly in process of being switched. Plaintiff had to pass from depot to track to board his train, and while crossing he stepped back from one track to avoid an approaching train when he was struck by the freight car and injured. Negligence charged was "kicking" a freight car, detached from its engine, in front of passenger depot, while passengers were waiting for train. Judgment for plaintiff for \$1,850 affirmed, the Supreme Court holding that the question of negligence was properly submitted to the jury.

Defective Stairway at Elevated Station :

MILLIE v. MANHATTAN RAILWAY CO., 5 Misc. 301 (N. Y. Common Pleas, 1893), was a motion to dismiss complaint on plaintiff's evidence. Plaintiff was injured by tripping on defective step of stairway of elevated railroad station. *PRYOR, J.*, discussed the case at length, citing many authorities, and ruled that the maxim "*res ipsa loquitur*," did not apply. The court, in discussing plaintiff's evidence in support of the proposition that the defect caused the injury, said: "Her contention is that the disordered and insecure condition of the rubber on a particular step caused her to trip and fall; but the proposition is not supported by a particle of direct or positive testimony. In reply to the question, 'Do you mean to say that you saw her trip on the rubber that you found afterwards to be loose?' the witness said, 'No, sir; I did not see that.' And in answer to plaintiff's counsel the witness said that when she fell he could not see her foot. Thus the witness did not testify, and was unable to testify, that she tripped upon the dislocated and protruding rubber—in other words he did not state, and was unable to state, that the cause assigned for her fall was, in fact, the occasion of her fall. What, then, is the proof that the cause assigned was actually the occasion of her fall? The fact is matter of inference merely, and by this process of reasoning, namely, because the rubber was loose and protruding after the plaintiff's fall, the inference is that it was loose and protruding before her fall; and because the rubber was thus inferentially insecure and dangerous, the further inference is deduced that the plaintiff stepped upon it, and so sustained her injury." This was held insufficient, the presumption not being based upon a fact. Motion to dismiss complaint granted. *ROGER FOSTER*, appeared for plaintiff; *EDWARD B. THOMAS*, for defendant. (Affirmed in 10 Misc. 734).

See also, *JOHNSON v. MANHATTAN RAILWAY CO.*, 52 Hun, 111.

Persons Injured on Track after Alighting from Trains :

HOFFMAN, Adm'r, v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 75 N. Y. 605 (1878), judgment against defendant. Plaintiff's intestate, after alighting from defendant's train, passed along the track to get to the highway, when she fell into a cattle guard on

the highway, which was filled with snow, and in trying to extricate herself was struck by engine of gravel train and killed. The trial court having nonsuited the plaintiff it was held error, it being the duty of defendant to furnish a safe and convenient passage from its depot to the highway. (Affirming 13 Hun, 589.)

In *PARSONS, Executrix, v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 113 N. Y. 355 (1889), plaintiff's intestate was struck and killed by a fast freight train on the track in front of the station house, he having alighted from one of defendant's trains. Judgment for plaintiff affirmed.

ARMSTRONG v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 66 Barb. 437 (1873), action for damages for injuries to plaintiff who was struck by a train as he was walking along the track to get to the depot after alighting from one of defendant's trains. Judgment for plaintiff for \$2,500 affirmed. The case was affirmed by Court of Appeals, in 53 N. Y. 623.

CURTIS v. ROCHESTER AND SYRACUSE RAILROAD COMPANY.

Court of Appeals, New York, March, 1859.

[Reported in 18 N. Y. 534.]

DERAILMENT OF TRAIN—PRESUMPTION OF NEGLIGENCE
—INSTRUCTION.—In an action to recover damages for injuries sustained by a passenger due to the derailment of defendant's train the court charged "that the fact of this accident occurring was of itself presumptive evidence of negligence on the part of the defendants." *Held*, that the charge referred to the particular accident which was the cause of action, and as such, was proper.

PRESUMPTION OF NEGLIGENCE.—Evidence of the mere happening of an accident and injury to a passenger is not of itself presumptive evidence of negligence on the part of the carrier.

DAMAGES—FUTURE PAIN.—Damages for future bodily pain may be awarded when it is reasonably certain from the evidence that they will inevitably and necessarily result from the original injury.

"**ACTION** for damages for injuries received by a passenger on the defendant's railroad from the negligence of its servants. On the trial, before Mr. Justice Johnson, at the Cayuga Circuit, the evidence was that the train containing the plaintiff ran off the track at Waterloo, at a switch. The proof left it uncertain whether the switch was deranged, or the accident resulted from the spreading and breaking of the rails. There was no evidence that there was any visible defect in the apparatus prior to the accident. The plaintiff's

ankle was wrenched and her leg bruised. A running sore or ulcer succeeded upon the bruised place, which continued running down to the time of the trial, nearly two years after the accident. There was considerable medical testimony in respect to the probability of the sores being healed at some future time, and as to the continued effect of the plaintiff's injuries in causing bodily pain and affecting her general health. The only exceptions were to the charge, and are sufficiently stated in the following opinions. The plaintiff had a verdict and judgment, which having been affirmed upon appeal at general term, the defendant appealed to this court." *Judgment affirmed.* (Affirming 20 Barb. 282.)

ALONZO C. PAIGE, for appellant.

GEORGE RATHBUN, for respondent.

Selden, J. — The judge charged the jury in this case, "that the fact of *this* accident occurring was of itself presumptive evidence of negligence on the part of the defendants." If by this the judge is to be understood as saying that, in cases of this kind, evidence of the mere happening of an accident, resulting in injury to the plaintiff, without proof of any of the circumstances under which it occurred, establishes, *prima facie*, the charge of negligence, I am not prepared to assent to the proposition. Carriers of passengers are not insurers; and many injuries may occur to those they transport for which they are not responsible. They are, for obvious reasons, held bound to exert the utmost care and vigilance to secure the safety of the passengers, and are responsible for the slightest negligence.

But injuries may often happen through the fault or misconduct of those whose acts are in no way chargeable to them. In travelling in stage coaches, upon ordinary roads, such injuries would be very frequent, because, in such cases, the proprietors of the coach do not construct the roads, nor control those who travel upon them. For a large portion of the accidents, therefore, which result from defects in the road or collisions with other vehicles, the proprietors would not be liable.

The carrier, however, is in all cases bound to provide a safe and secure carriage for the transportation of the passengers, and nothing can exempt him from this responsibility, but the existence of some latent defect, which no reasonable degree of human skill and foresight could guard against; and this obligation extends to every species of appliance belonging to the carrier and used by him in the business in which he is engaged. Consequently, whenever it appears that the accident occurred through some defect in the

vehicle, or other apparatus used by the carrier, a strong presumption of negligence arises, founded upon the improbability of the existence of any defect which extreme vigilance, aided by science and skill could not have detected.

The cases in which the carriers would be exempt from responsibility would be far less frequent where the transportation is upon railroads than where it is upon common roads, because railroad companies have the entire control of the track, and of all engaged in its use. Still, accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed, by strangers, upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them. The straying of cattle or horses upon the roads causes numerous accidents which are not chargeable to the company. If a drunken man falls asleep or a deaf man incautiously walks upon the road, in consequence of which a train is unavoidably thrown from the track, and a passenger is injured, he is without redress as against the company. So if a careless driver, in crossing a track, fails to get his vehicle out of the way of an approaching train. How, then, can it be assumed, without proof of any sort, when an accident has occurred, that it was caused by some carelessness on the part of the agents of the company, and not by any or either of these numerous causes?

In regard to the carriages and other apparatus used for the carrying of passengers, railroad companies are under the same obligation as that already alluded to in the case of the carrier upon common roads. They make and own their road, and have the exclusive control of that, and of every part of the machinery and apparatus used in connection with it. Passengers have no means of knowing nor any power of remedying its defects, but are forced to trust their lives and persons to the care and watchfulness of the agents of the company. The latter, therefore, is bound to see that the road and all its appurtenances are in perfect order and free from any defect which the utmost vigilance, aided by the highest degree of knowledge and skill, could discover or prevent.

Consequently, whenever it appears that the accident was caused by any deficiency in the road itself, the cars or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order, immediately arises; it being extremely unlikely that any defect should exist of so hidden

a nature that no degree of skill or care could have foreseen or discovered it.

If it be said that upon the same principle upon which negligence is presumed in such a case it should be presumed in every case, on account of the high degree of improbability that a serious accident of any kind should occur, without some degree of negligence, the answer is plain; and to present this distinction is the object of most that has been said. There may be a presumption of negligence in every case, but, where nothing is known in regard to the cause of the accident, the negligence may as well have been that of some one residing in the vicinity of the road, or of some stranger, of whom numbers come in contact with it every day, as of any of the employees of the company; while if it appears that the mischief has resulted from a defect in some part of the apparatus of the company, the negligence, if any, must have been that of someone for whose acts and omissions the company is liable, it being well settled that the carrier is responsible for the negligence or want of skill of every one who has been concerned in the manufacture of any portion of its apparatus. *Hegeman v. Western R. R. Co.*, 3 Kern. 9 (1); *Ware v. Gay*, 11 Pick. 106 (2); *Ingalls v. Bills*, 9 Metc. 1 (3).

The cases in which it has been said that a presumption of negligence arises from the mere proof that an accident has occurred, will appear, if examined, not to conflict materially with these principles; and some of them are, I think, illustrative of the distinction just suggested. The leading cases on the subject are those of *Christie v. Griggs*, 2 Camp. 79 (4); *Stokes v. Saltonstall*, 13 Pet. 192 (5); *Carpue v. London & B. R'y Co.*, 5 Ad. & El. N. S. 747 (6);

1. *HEGEMAN v. WESTERN R. R. Co.*, 13 N. Y. 9 (1855), was an action for damages for injuries to plaintiff's hip caused by derailment of train through breaking of an axle. Judgment for plaintiff for \$9,900 affirmed. (Affirming 16 Barb. 353.)

2. Note of this case on page 426, *ante*.

3. Reported in this volume, page 426, *ante*.

4. In *Christie v. Griggs*, 2 Camp. 79, plaintiff was a passenger on defendant's coach when the axletree snapped and plaintiff was thrown off and injured. The court said the

plaintiff had made a *prima facie* case by proving his going on the coach, the accident and the damage he had suffered.

5. *Stokes v. Saltonstall*, 13 Pet. 192, is reported in 7 Am. Neg. Cas. 297.

6. In *CARPUE v. LONDON AND BRIGHTON R'Y CO.*, 5 Ad. & El. N. S. (5 Q. B.) 747, it appeared that a railway company was empowered to make a railway, which all persons were to have the liberty of using with carriages, on payment of tolls. The company was also empowered to provide locomotive engines, and

Laing *v.* Colder, 8 Barr, 479 (1).

In *Christie v. Griggs*, where Sir James Mansfield is supposed to have laid down the proposition in question, it was proved that the injury was caused by the breaking of the axletree of the coach, upon the top of which the defendant was seated; and it was in view of this proof that the Chief Justice made the remark that "the plaintiff had made a *prima facie* case by proving his going on the coach, the accident and the damage he had suffered." There is no doubt that, in such a case, negligence should be presumed for the reasons which have been given.

In the case of *Stokes v. Saltonstall*, which was also an action against the proprietors of the line of stage coaches, the court instructed the jury that the "facts that the carriage was upset and the plaintiff's wife injured, were *prima facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver; and threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault." Taken abstractly, this instruction, which was sustained by the court, might seem to be in conflict with the principles here contended for; but, if understood in reference to the proof, it is otherwise. The plaintiff had proved, not only the accident and the injury, but that the passengers had remarked that the driver appeared intoxicated, and so told the agent of the proprietors; that the road was perfectly level, and not dangerous or difficult; and that the reckless conduct of the driver had called out repeated remonstrances from the passengers, which were wholly unattended to. Here was ample proof of negligence,

charge for their use, and to use locomotive engines and carriages for the conveyance of passengers, and to charge for such conveyance, in addition to the tolls, within a limited amount. It was enacted that no action should be prosecuted against any person, for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers given by it, without twenty days' notice in writing. A declaration against the company charged that they were owners of the railway, and of carriages used for the conveyance of passengers along it for reward; that the plaintiff became a passenger in one of the carriages, for

reward to them; and it became their duty to use due care in conveying him. Breach, that they did not use due care in conveying him, but so negligently conducted themselves in carrying him, and managing the carriage in which he was passenger, the train to which it was attached, and the engine, whereby it was drawn upon the railway, that the carriage was thrown off the rails, and the plaintiff injured. Held, that no notice of action was necessary, the company being sued in their capacity of carriers, and not for anything done or omitted under the act.

1. Reported in 10 Am. Neg. Cas.

and the judge must have had these circumstances in view when he made his remarks to the jury. The happening of the accident, under the circumstances proved, was undoubtedly *prima facie* evidence of negligence.

The other two cases were actions for injuries upon railroads. In that of *Carpue v. London and Brighton R'y Co.*, it appeared that the position of the rails had been somewhat deranged, at the spot where the injury took place; and the Chief Justice charged the jury, that it having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced. This is in perfect accordance with the principles which have been here advanced.

Laing v. Colder is perhaps the strongest case in support of the doctrine against which we contend. When that case was heard *in banco*, Bell, J., said, "the mere happening of an injurious accident raises, *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing it did not exist." But the charge of the judge at the circuit upon which the question arose was not so broad. He instructed the jury that "in the *present* case the presumption was there had been negligence," a charge fully justified by the proof, which was that the accident occurred while the car was crossing a bridge, which was so narrow that the plaintiff's hand lying outside the car window was caught by the bridge and his arm broken. It was palpable negligence on the part of the company so to construct the bridge.

In no instance, that I am aware of, has it been said by any judge that negligence, on the part of the carrier, was to be presumed from the mere happening of an accident, except where the facts proved in the particular case fully warranted the presumption upon the principles here insisted upon.

The views here presented are, I think, sustained by the opinion of this court, in the case of *Holbrook v. Utica and Schenectady R. R. Co.*, 2 Kern. 236. Ruggles, J., there says: "In actions like the present the burden of proving that the injury complained of was caused by the defendant's negligence lies on the plaintiff. The same rule applies as in an action for an injury to a passenger in a stage coach. It generally happens, however, in cases of this nature, that the same evidence which proves the injury done, proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the

defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown."

It does not follow from what has been said, that the judgment in this case is to be reversed for error in that part of the charge referred to. The very first witness called by the plaintiff upon the trial proved enough of the circumstances of the case to warrant the presumption of negligence. It was clear from his testimony that the accident was caused by some defect in the track, and in all probability by the misplacement of the switch. It was immaterial, however, whether it was this, or the spreading of the rails, as the company sought upon cross-examination to show, which threw the train from the track. In either case, the presumption of negligence would arise. The judge was fully warranted in instructing the jury, that the occurrence of the accident, under the circumstances disclosed by the evidence, authorized the presumption of negligence. Did he do more than this? He did not say to the jury, in the language of Judge Bell, in *Laing v. Colder*, that "the mere happening of *an* injurious accident" raises a presumption of negligence; but his words were, that "the fact of *this* accident occurring" was presumptive evidence, etc. The effect is attributed not to any and every accident, but to this particular accident. A verdict like this, sustained as it is by ample evidence, ought not to be disturbed by a construction which would make the charge a mere abstraction, not called for by the exigencies of the case, provided any other interpretation is admissible. There is no reason to suppose that the jury were misled. They were carefully instructed, that if the injury was the result of pure accident, without any neglect of the defendants, the plaintiff could not recover; and under the view which has been taken, the charge, so far as the exception under consideration is concerned, may, I think, be properly sustained.

A question also arises upon that part of the charge in which the jury were told, that in estimating the damages, they would be justified in taking into consideration "the bodily pain and suffering which the plaintiff suffered or *was likely to suffer*, in consequence of the neglect of the defendants." This instruction, in so far as it relates to future pain and suffering, is clearly erroneous, and if it had not been subsequently modified, the error would, I think, have been necessarily fatal to the judgment. There is no doubt that bodily pain and suffering is a proper item of damages in such cases. *Ransom v. N. Y. & Erie R. R. Co.*, 15 N. Y. 415. Nor is the

estimate necessarily limited to suffering which is past, where the proof renders it reasonably certain that future pain and suffering is inevitable. In estimating the pecuniary loss in such cases, all the consequences of the injury, future as well as past, are to be taken into consideration; and there seems to be no reason why a different rule should prevail in respect to bodily pain and suffering. But the objection to the charge is, that it authorizes an allowance of damages for future pain which is rendered probable merely. Damages are to be proved; and none can be allowed except such as are shown by the proof to be, at least, to a reasonable degree, certain. The error, however, was corrected upon the trial. The judge, upon his attention being called to the point, further instructed the jury, "that future damages could only be awarded when it is rendered reasonably certain from the evidence, that such damages will inevitably and necessarily result from the original injury." With this qualification, I see no objection to the charge on this subject, and this exception also should, therefore, be overruled.

The judgment should, I think, be affirmed.

Grover, J.— August 7th, 1852, the plaintiff took passage in the defendants' cars at Geneva for Auburn. As the train was passing Waterloo, it ran off the track, and the plaintiff was injured. The court, among other things, charged the jury that the fact of this accident occurring was, of itself, presumptive evidence of negligence on the part of the defendants, and it lay with them to explain it and to prove that they were not negligent, in order to discharge them from liability to the plaintiff; to which the defendants excepted. The plaintiff was bound to prove her cause of action. That was, that she had received an injury caused by the negligence of the defendants. The negligence of the defendants must be proved by the plaintiff, as well as the reception of the injury. It was not enough for her to prove, that while a passenger upon the defendants' cars, she was injured. In this case, proof was given that the cars ran off the track, and that this occasioned the injury. It was in reference to this evidence that the judge charged the jury that the fact of this accident occurring, was presumptive evidence of negligence on the part of the defendants. The question is, whether the plaintiff was bound to go further, and show the particular cause of the cars being thrown from the track, or whether it was for the defendants to show that it was accidental, and without neglect upon their part. This question may be determined upon principles applicable to all modes of carrying passengers. It is the duty of all engaged in this business,

in any mode, to use care to secure the safety of the passenger, proportioned to the danger incident to the mode of conveyance. In case this care is applied, as a general result, the safety of the passenger will be secured, so far as that safety depends upon the state or condition of any of the means provided by the carrier and used in the business. If there is no imperfection in any of these, and suitable caution is employed by those engaged in their application, everything dependent thereon will accomplish the end in view. This is as certain as the laws of mechanics. When, therefore, an injury is received from a derangement of anything employed by the carrier, the presumption necessarily arises that there existed somewhere an imperfection in the machinery employed, or negligence in its application. It is the duty of the carrier to provide perfect machinery, and if he has failed in this, it devolves upon him to show the excuse, if any. This is the rule applicable to all cases where a party seeks exoneration from a duty imposed upon him by law or incurred by contract. The plaintiff has established his cause of action when he has shown a failure to perform the duty from which he has sustained an injury. It is for the defendant, then, to show the facts relieving him from responsibility in the particular case. This imposes no hardship upon the defendant in this class of cases. The whole management is exclusively under his control. He has ample means to show the true cause of the difficulty. The plaintiff knows nothing about it. He takes passage with the carrier, who, instead of conveying him safely, inflicts an injury upon him by the failure of some part of the machinery employed by him. In many cases, it would be impossible for the plaintiff to ascertain the particular defect, and I think no such obligation is imposed upon him by the rules of evidence. The authorities are uniform in favor of the rule held by the judge. *Stokes v. Saltonstall*, 13 Pet. 181; *Carpue v. London & Brighton R. R. Co.*, 48 Eng. Com. L. R. 746; *Holbrook v. Utica & Schenectady R. R. Co.*, 16 Barb. 113, and cases there cited. The same rule is laid down by the elementary writers. Angell on Carriers, § 569; 2 Greenl. Ev., 222. The defendants' counsel cited the case of *Holbrook v. Utica & Schenectady R. R. Co.*, 2 Kern. 421, in opposition to the rule. I understand that case as substantially sustaining the rule as laid down by the judge in his charge in this case. Ruggles, J., says that if the witness who swears to the injury testifies, also, that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises. Just so

when it is proved that the injury arose from any derangement, crush or displacement of the track or cars.

The exception to that portion of the charge holding that the plaintiff could recover a compensation for bodily pain suffered, or that she was likely to suffer, is general; and it is settled that such an exception is unavailing when any portion of the charge thus excepted to is correct. In *Ransom v. N. Y. & Erie R. R. Co.*, it was decided by this court that bodily pain and suffering from an injury was a proper subject for pecuniary compensation. This exception does not render it necessary to examine that portion of the charge, holding that the plaintiff could recover for pain and suffering likely to be suffered. In this case, the judge, I think, laid down the true rule, in substance, in regard to future pain and suffering, in another portion of his charge: That the plaintiff could only recover damages for such pain and suffering as the evidence rendered reasonably certain would necessarily result from the injury. But, as remarked above, the exception is too general to present any question as to future pain.

The judge was correct in refusing to charge the jury, as requested, that the uncontradicted proof shows that the switch was rightly placed for the train in which the plaintiff was a passenger, and awaiting its approach, and that this rebutted any presumption of negligence arising from the accident. There was evidence tending to show that the train ran off the track at the point of approach to the switch. There was evidence tending to show that the switch was improperly placed, and proper for the consideration of the jury upon that question. The judgment should be affirmed.

AMONG OTHER NEW YORK CASES RELATING TO DERAILMENT OF TRAINS, ETC., ARE THE FOLLOWING :

Mail Agents Injured in Derailment :

NOLTON v. WESTERN RAILROAD CORPORATION, 15 N. Y. 444 (1859), action for damages for injuries sustained by plaintiff, a mail agent, in a derailment of the car on which he was riding, due to defective machinery. Judgment for plaintiff affirmed. (Affirming 10 How. Pr. 97.)

SEYBOLT, Adm'x. v. NEW YORK, LAKE ERIE & WESTERN R. R. Co., 95 N. Y. 562 (1884), was an action for damages for death of plaintiff's intestate, a mail agent or postal clerk, caused by the train being derailed and colliding with obstructions on side track. Judgment for plaintiff affirmed.

See also **BLAIR v. ERIE R'Y Co.**, 66 N. Y. 313; **BREWER v. NEW YORK, LAKE ERIE & WESTERN RAILROAD Co.**, 124 N. Y. 59;

KENNEY v. NEW YORK CENTRAL, ETC., R. R. Co., 125 N. Y. 422, as to injuries to express messengers.

Riding on Free Pass:

PERKINS, Adm'x, v. NEW YORK CENTRAL R. R. Co., 24 N. Y. 196 (1862), was an action for damages for death of plaintiff's intestate caused by the breaking of a bridge over a creek and train falling through same. The deceased was riding on a pass issued to him by the railroad company, containing the following clause exempting the company from liability: "Notice.—The person accepting this free ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using this ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket. This pass is not to be presented or used by the holder to procure a pass over any other road." On the trial plaintiff recovered judgment for \$5,000, which, on appeal, was reversed, the court holding that the clause in pass exempting carrier from liability for negligence was valid and applied to gross as well as slight negligence.

In **WELLS v. NEW YORK CENTRAL R. R. Co., 24 N. Y. 181 (1862)**, plaintiff, while riding on a pass, was injured by reason of train falling through bridge. Judgment for plaintiff reversed, the court holding that clause in free pass exempting carrier from liability for injury to person using same caused by negligence of its servants, valid. (Affirming 26 Barb. 641.)

But in **SMITH v. NEW YORK CENTRAL R. R. Co., 24 N. Y. 222**, where a drover in charge of stock was killed, judgment for plaintiff for \$5,000 was affirmed, although the contract of passage contained a clause exempting carrier from liability, the pass stating that holder took all risk as to injury to himself or stock. (Affirming 29 Barb. 132.)

See also **ELLIOTT v. NEW YORK CENTRAL, ETC., R. R. Co., 53 Hun, 78**; **PORTER v. NEW YORK, LAKE ERIE & WESTERN R'y Co., 59 Hun, 177**, affirmed in 129 N. Y. 627, as to persons riding on passes.

In **BISSELL, Adm'x, v. NEW YORK CENTRAL R. R. Co., 25 N. Y. 442 (1862)**, it was held that a carrier might lawfully exempt itself from liability for negligence in contract to carry person at reduced rates. Judgment for plaintiff for \$5,000 reversed in action for damages for negligent killing of plaintiff's intestate, a drover in charge of stock, while travelling on defendant's train. (Reversing 26 Barb. 630.) **Wells v. New York Central R. R. Co., 24 N. Y. 181**, and **Perkins v. New York Central R. R. Co., 24 N. Y. 196**, followed, as to validity of clause exempting carrier from liability for negligence in granting pass to person to ride free on its train.

See also **POUCHER v. NEW YORK CENTRAL, ETC., R. Co., 49 N. Y. 263**; **COPPOCK v. LONG ISLAND R. R. Co., 89 Hun, 186**, as to drovers' passes.

ULRICH v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co., 108 N. Y. 80 (1888), was an action for damages for injuries sustained by a person riding on a pass. Plaintiff had paid for a seat in drawing-room car, and was riding in such car when a collision occurred, resulting in injuries to his head and face. Verdict for plaintiff for \$1,600 damages. On appeal, judgment reversed, the court holding that the purchase by plaintiff of seat in drawing-room car did not nullify the agreement made on the issuance of the pass to him to assume risks of accident.

Animals on Track :

In **BOWEN v. NEW YORK CENTRAL R. R. Co.**, 18 N. Y. 408 (1858), judgment for plaintiff was affirmed in an action for damages for injuries sustained in the overturning of the car in which plaintiff was a passenger, due to the train colliding with a cow on the track.

In **BROWN v. NEW YORK CENTRAL R. R. Co.**, 34 N. Y. 404 (1866), where train was derailed by reason of colliding with cow on track, judgment of nonsuit was reversed, there being evidence that cow was seen by engineer in time to have avoided the accident, and plaintiff was entitled to have case go to jury.

Broken Rail :

In **BRIGNOLI v. CHICAGO & GREAT EASTERN R'y Co.**, 4 Daly, 182 (N. Y. Common Pleas, 1871), judgment for plaintiff was affirmed, in action for damages for injuries sustained in derailment of a train, caused by a broken rail, the car in which plaintiff was riding being overturned and plaintiff's shoulder being injured.

Malicious Act of Unknown Person :

In **DEYO v. NEW YORK CENTRAL R. R. Co.**, 34 N. Y. 9 (1865), judgment of nonsuit affirmed where train was derailed due to mischievous act of some unknown person.

Open Switch :

In **TAFT, Adm'r, v. BROOKLYN HEIGHTS R. R. Co.**, 14 Misc. Rep. 390 (Brooklyn City Court, 1895), judgment for plaintiff was affirmed, where a passenger, while riding on front platform of street car, was thrown therefrom by the car taking an open switch and jumping the track, the passenger being severely injured in the head and abdomen, and peritonitis subsequently developing he died, it being claimed that the same was the result of the accident.

Obstructions on Track :

In **WILLIS v. LONG ISLAND R. R. Co.**, 34 N. Y. 670 (1866), plaintiff, who was riding on the platform of train, the car being filled with passengers, was injured in a collision of the train, caused by obstructions on the track. Judgment for \$3,100 for plaintiff, whose legs were permanently injured, affirmed, it being held not contributory negligence for passenger to ride on platform where carrier fails to provide seat inside car. (Affirming 32 Barb. 398.)

In **EDGERTON v. NEW YORK & HARLEM R. R. Co.**, 39 N. Y. 327

(1868), where plaintiff's head and knee were injured in a collision, while riding in the caboose car of defendant's train, the train having left the track and collided with freight car on another track, judgment for plaintiff for \$4,500 was affirmed. (Affirming 35 Barb. 193, 389.)

Collisions :

IN CHAPMAN v. NEW YORK & NEW HAVEN R. R. Co., 19 N. Y. 341 (1859), judgment for plaintiff for \$6,500 was affirmed, in action for damages for injuries sustained in a collision while a passenger on defendant's train (1).

IN COLEGROVE v. NEW YORK & NEW HAVEN R. R. Co., 20 N. Y. 492 (1860), judgment for plaintiff for \$450 was affirmed, where plaintiff standing on platform of crowded train, sustained an injury to his ankle in a collision between trains. Affirming 6 Duer, 382.

IN WEBSTER v. HUDSON RIVER R. R. Co., 38 N. Y. 260 (1868), judgment for plaintiff for \$1,800, damages for injuries to spine sustained in collision while on defendants' train, affirmed.

IN WEBSTER v. ROME, WATERTOWN & OGDENSBURG R. R. Co., 40 Hun, 161 (1886), judgment for plaintiff for \$4,500, whose back and shoulder were injured in a collision, was affirmed.

CONNELLY v. MANHATTAN R'Y Co., 68 Hun, 456 (1893), judgment for plaintiff, who was injured in a collision on the elevated railroad during the "blizzard" of March 12, 1888, was affirmed with modifications. The first trial resulted in verdict for plaintiff for \$10,000, which was reversed by the Supreme Court for an error in admission of a certain question and answer (60 Hun, 495). The second trial resulted in verdict for plaintiff for \$20,000. On appeal judgment affirmed, on plaintiff stipulating to reduce verdict to \$12,500. (Reversed in 142 N. Y. 377.)

IN THOMPSON v. MANHATTAN R'Y Co., 42 N. Y. Supp. 896 (Appellate Division, 1896), judgment for plaintiff, for \$15,000, whose spine was injured in a collision while a passenger on defendant's train, was reversed on the ground of error in admission of certain medical testimony.

IN WILSON v. BROADWAY & SEVENTH AVENUE R. R. Co., 8 Misc. Rep. 450 (N. Y. Superior Court, 1894), judgment for plaintiff, for \$3,250, whose arm, wrist, hand and fingers were injured in a collision between street cars while a passenger on defendant's car, was affirmed.

1. Among other New York actions relating to Collisions, Derailments, Railroad Wrecks, etc., see **LYONS v. ERIE RAILWAY Co.**, 57 N. Y. 489; **Quinn v. Long Island R. R. Co.**, 34 Hun, 331; **Alden v. N. Y. Central R. R. Co.**, 26 N. Y. 102; **Matteson v. N. Y. Central R. R. Co.**, 35 N. Y. 487; **McPadden v. N. Y. Central R. R. Co.**, 44 N. Y. 478; **Reed**

v. N. Y. Central R. R. Co., 45 N. Y. 574; **Cole v. N. Y. Central R. R. Co.**, 48 N. Y. 679; **Anderson v. Rome, Watertown & Ogdensburg R. R. Co.**, 54 N. Y. 334; **Hoyt v. Long Island R. R. Co.**, 57 N. Y. 678; **Cardot v. Barney**, 63 N. Y. 281; **Tisdale v. Delaware & Hudson Canal Co.**, 116 N. Y. 416; **Daub v. Yonkers R. R. Co.**, 69 Hun, 138.

**SHERIDAN, ADM'R, V. BROOKLYN CITY AND
NEWTOWN RAILROAD COMPANY.**

Court of Appeals, New York, January, 1867.

[Reported in 36 N. Y. 39.]

**PUSHED OFF CAR BY ANOTHER PASSENGER—COMPANY
LIABLE.**—Where it appeared that a boy nine years of age, who was seated in a street car, was ordered by the conductor to give up his seat, and the car being crowded was pushed out on the front platform, and while there was thrown from the car by the rush of another passenger in getting off, and received injuries from which he died, the company was liable.

DUTY OF RAILROAD COMPANY TO SICK OR LAME PASSENGERS.—A sick or aged person, a delicate woman, a lame man, or a child is entitled to more attention and care from a railroad company than one in good health and under no disability.

ORDINARY CARE ONLY REQUIRED OF PASSENGERS.—Ordinary capacity and ordinary care and attention in protecting themselves is all the law requires from passengers in a railroad car.

"THIS was an action under the statute brought by the plaintiff as administrator of Dennis Sheridan, deceased, to recover damages for the wrongful acts of the defendants, which resulted in the death of the deceased. The plaintiff recovered at the circuit and the judgment was affirmed at the General Term of the second district. The facts are more fully stated in the opinion of the court." *Judgment affirmed.*

A. J. PARKER, for appellants.

JAMES EMOTT, for respondents.

Hunt, J.—This is an action by the administrator of a boy nine years of age, against the defendants, a company running a horse railroad in Brooklyn, for causing the death of the boy by the negligence and misconduct of the defendants.

On the 15th of September, 1864, the deceased, having paid his fare, was seated with a companion of his own age, in the interior of a car of the defendants. The car began to fill up with passengers, and the conductor ordered the boys to get up and make room for adult passengers. They went forward in the car and took other seats, and were again ordered up, and, objecting to give up their seats, were "put out" of their places by the conductor.

The car had by this time become very full, "very crowded." The

deceased was crowded and pushed by the passengers in the car out on the front platform, which, as well as the inside of the car, was full of people.

While there, the car being in motion, there was a rush of another passenger to get off, and the deceased was thrown off the car, was run over, and received injuries from which he died. At the close of the evidence the defendants moved for a nonsuit. The court denied the motion, and the defendants excepted. There was a conflict of evidence, and the jury, by their verdict, adopted the view claimed by the plaintiff on the trial, and we are to take the same view on this appeal. It is this view which I have given above.

The defendants insist that the motion for a nonsuit should have been granted, urging that there was negligence on the part of the deceased in occupying a position upon the platform, and that the defendants were no more responsible than if the boy had been shot with a revolver, or struck with a club, by a fellow passenger. The question of the negligence of the deceased in remaining upon the platform was submitted to the jury, under the instructions hereafter to be considered. For the present we are to assume that the deceased was upon the platform by the express requirement of the defendants, and against his own remonstrance, properly, so far as the defendants are concerned. If by the motion of the cars he had been thrown from this dangerous position, or by the continued pressure of the large crowd which the defendants had permitted upon their cars, he had been pushed from his standing place, the defendants would have been liable. It does not alter this liability that the wrong of a third party concurred with their own in producing the injury. It may well be, that the young man was not justified in rushing through the crowd, and in aiding in throwing the deceased from the car ; but this does not relieve the defendants' wrong. If they had not removed the deceased from his seat, and compelled him to stand upon the platform, he would have been unaffected by this illegal act of the young man. It was his violence, concurring with the defendants' illegal conduct, in overcrowding their car, and in placing the deceased upon the platform, that produced the disastrous result. It is no justification for the defendants, that another party, a stranger, was also in the wrong.

Upon the evidence, the jury would also have been justified in finding the defendants guilty of negligence, in that the car was not stopped, when the strap was pulled for that purpose. On this branch of the case, as on the others, there was conflicting evidence. There was testimony on which the jury might have found that the

bell was rung twice, before the young man reached the platform, and that the driver should have stopped the car. It is quite clear that if the car had been stopped, the accident could not have happened to the deceased, in its full extent, as it appeared that he was run over by the rear trucks, and there received the injury which resulted in his death.

On both branches of the case, it was the duty of the court to leave the question of negligence to the jury, and there was no error in denying the motion for a nonsuit.

At the close of the evidence, the defendants' counsel requested the court to charge the following propositions:

"First—That the fact that the deceased was a child, makes no difference in the application of the rule of law as to the question of negligence. If not of years of discretion, he should have a protector.

"Second—The evidence showing that the deceased was knocked off the car, while the car was in motion, and that none of the defendants' servants contributed to the act, the plaintiff cannot recover in this action.

"Third—That the deceased was in fault in going onto the front platform, and although the defendants may have been guilty of negligence, yet where each party is guilty there can be no recovery."

The court declined to charge otherwise than as set forth, to which defendants excepted. The second and third of these requests do not require much consideration. Each of them is open to the objection of assuming as matter of fact what is not such, and what the jury found to be otherwise. Thus, the second proposition assumes that none of the defendants' servants contributed to the deceased being knocked from the car, and the third assumes that the deceased was in fault in going upon the platform. The jury, however, found that it was the very act of the conductor in placing him on the platform that produced the result, and that he was not in fault in being there. If the second proposition was intended to be limited to the immediate act of throwing the deceased from the car, it was not sound in any aspect.

The defendants' counsel claims more seriously, that there was error in refusing to charge the proposition first requested, to wit, "that the fact that the deceased was a child, makes no difference in the application of the rule of law as to the question of negligence; if not of years of discretion he should have a protector." The question of negligence as here put forth, arises upon the conduct of the deceased in taking care of himself, and also upon the conduct of the defendants in regard to the deceased. In the latter view the rule

asked for would not have been correct. A sick or aged person, a delicate woman, a lame man, or a child, is entitled to more attention and care from a railroad company than one in good health and under no disability. They are entitled to more time in which to get on or off the cars; they are entitled to more consideration when crossing a street, to the end that the cars shall not run over them. All these classes are entitled to use the streets and to ride in the cars; and such haste in starting up, or such speed in driving as would be reasonable care toward others, might well be carelessness and neglect toward them.

The proposition in question also embraces the degree of care necessary to be used by the deceased in respect to himself. It embraced too much in any respect, when it requested a charge as matter of law, that "if not of years of discretion he should have had a protector." This would be a rule quite too rigid. There was no pretense that this boy was so young as to require a protector. The court did charge that if the jury were of opinion that the lad was negligent in any way, and his negligence contributed to the injury, the plaintiff could not recover; but if there was no negligence on the part of the boy, and there was on the part of the company, then he could recover. The rule of law was laid down generally, and the deceased, although a lad only, was required to conform to the standard. No exception or discrimination was made in favor of youth. It was not the province of the court to say, whether what the boy actually did or omitted, constituted negligence, that was for the jury exclusively. The court could only submit the general question of negligence to the jury, with instructions as to the law applicable to it.

No one, whether sick, lame, imbecile, or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves, is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence.

For the general principles that I have laid down, see *Ernst v. Hudson River R. R. Co.* 35 N. Y. 9; *Willis v. Long Island R. R. Co.*, 32 Barb. 398, affirmed in Court of Appeals, 34 N. Y. 670; *Beiseigel v. N. Y. Central R. R. Co.*, 34 N. Y. 622.

I think the case was correctly tried and that the judgment below should be affirmed. All concur.

GINNA, ADMINISTRATOR, V. SECOND AVENUE RAILROAD COMPANY.

Court of Appeals, New York, November, 1876.

[Reported in 67 N. Y. 596.]

RIDING ON PLATFORM WITH CONSENT OF CONDUCTOR.—A passenger who boards a crowded street car and is unable to get further than the platform, where he stands without demur from the conductor who accepts his fare and is injured by the car running off the track, jolting him from the car, is not guilty of contributory negligence as matter of law.

FAILURE TO TAKE HOLD OF IRON ON PLATFORM NOT NEGLIGENCE PER SE.—A passenger riding on the platform of a street car without taking hold of the iron rail is not thereby guilty of negligence.

"**THIS** was an action to recover damages for the alleged negligent killing of John Ginna, plaintiff's intestate. (Reported below, 8 Hun, 494.)

"The deceased got onto one of defendant's cars, which, as defendant's driver testified, was crowded inside. He looked in. There was a lady standing against the door. He then turned and stood upon the platform with his back to the car. Three or four other passengers also stood upon the platform. The conductor, in collecting fares, instead of going through the car, had to pass around on the outside to the front platform. The deceased paid his fare. In consequence of a switch having been left open, the car ran off upon it, producing a violent jolt or shock, which threw off most of the persons riding upon the platform, and among them the deceased, who was so injured that he subsequently died. Defendant's counsel moved on the trial to dismiss the complaint on the ground of contributory negligence, which motion was denied. No question was made upon the appeal as to defendant's negligence. The court held as above, citing *Clark v. Eighth Avenue R. R. Co.*, 36 N.Y.135; *Willis v. Long Island R. R. Co.*, 34 N. Y. 670; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230; *Edgerton v. New York and Harlem Railroad Co.*, 39 N. Y. 227. Several exceptions were made to the forms of expression and to some irrelevant remarks of the judge in his charge. The submission of the questions in the case to the jury and the statement of the principles of law by which they were to be governed were substantially correct. Held, that an exception would not lie.

"The court instructed the jury that they had the right to infer 'that the deceased was holding onto the iron to keep onto the platform.' There was no evidence, upon that point. Held, error; but that the error was harmless, as the fact was immaterial; that, whether or not he took hold of the iron did not affect the question of negligence. It was not negligence *per se* for the deceased to omit to avail himself of the iron bar.

AUSTEN G. FOX, for appellant.

O. P. BURL, for respondent.

Allen, J., reads for affirmance. All concur.

NOLAN v. BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY.

Court of Appeals, New York, November, 1881.

[Reported in 87 N. Y. 63.]

RIDING ON FRONT PLATFORM NOT NEGLIGENCE *PER SE*—
NOTICE IN CAR.—Independent of the statute forbidding it, it is not negligence *per se* for a passenger to stand on the front platform of a moving car, and a rule posted in a street car forbidding passengers to get on or off the car in motion or on or off the front platform is not within the statute and the company will not thereby be relieved from liability.

INJURED WHILE RIDING ON FRONT PLATFORM.—Where it appeared that the plaintiff paid his fare to the conductor and stood without objection on the front platform of a street car, although there was plenty of room inside, and while so riding the driver whipped one of the horses, that plunged and jarred the car, and the plaintiff was thrown off and injured, the question of negligence was properly left to the jury, and a verdict for the plaintiff would not be disturbed.

APPEAL from the judgment of the General Term of the City Court of Brooklyn, entered upon an order made October 25, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict. The facts appear in the opinion. *Judgment affirmed.*

CHARLES B. ALEXANDER, for appellant.

FREDERIC A. WARD, for respondent.

Finch, J.— This is one of those cases where the real quarrel is with the verdict of the jury, and the struggle on appeal is to avoid their solution of the question of fact. Whether that can be successfully done, within the limits of our power of review, is the question to be considered.

The plaintiff, at a late hour of the evening, took passage upon one of the street cars of the defendant company. There were but two or three other passengers and abundance of room and vacant seats inside. Nevertheless, the plaintiff, who was smoking, rode upon the front platform. He did so, he says, because it was the custom of the line to permit no smoking elsewhere, but to permit it there. While thus riding on the platform, he claims to have been thrown off and injured by the negligence of the driver. His presence upon this platform, it is now insisted, was *per se* negligence, and bars his right of recovery. No decisive authority for this proposition has been cited to us. The printed rules of the company in connection with the General Railroad Act are first relied upon. (Laws of 1850, p. 211, § 46.) That act relieves the companies from liability where they post in their cars a warning against riding on the platform, and furnish a seat to the passenger within the car. Such a notice was claimed to have been given in this case, and the rule posted in the car was produced. That rule is in these words, viz.: "Passengers are forbidden to get on or off the car while in motion; or on or off the front platform; or on or off the side, except nearest the sidewalk." This rule does not at all forbid riding on the front platform. It is the getting on or getting off from that part of the car which is forbidden, evidently because a misstep or an accidental fall would there be more dangerous than at the rear platform. But once on, not a word of warning is uttered against remaining and riding there. The efficacy of the statute failing, it is next argued that the authorities determine the front platform to be a place of danger, and the passenger, who without necessity rides there, takes upon himself the risk of accident. We do not so understand the decisions to which our attention is called. In *Phillips v. Rensselaer & S. R. R. Co.*, 49 N. Y. 177 (1), the passenger undertook to get upon the cars while in motion, and was plainly guilty of contributory negligence. In *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135, the passenger was riding on the steps of the car, a position palpably more dangerous than riding on the platform. In *Ward v. Central Park, etc., R. R. Co.*, 11 Abb. Pr. (N. S.) 411, it appeared that the track was in bad condition from accumulation of snow and ice of which the passenger was fully cognizant, and which the court say was suggestive of the "extreme probability" of a jar or jolt. In *Solomon v. Central Park, etc., R. R. Co.*, 1 Sweeney, 298, the boy was sitting on the step of

1. *Phillips v. Rensselaer & Saratoga R. R. Co.*, 49 N. Y. 177, is reported in 5 Am. Neg. Cas. 166.

the front platform, and was thrown off by a jolt. In all these cases there was some element warranting an inference of negligence beyond and outside of riding on the front platform. These authorities do not establish the doctrine asserted. On the contrary, the rule is settled, that, independent of the mandate of the statute, which we have seen has no application here, it is not, even in the case of steam cars, negligence *per se* for a passenger to stand on the front platform of a moving car. *Willis v. Long Island R. R. Co.*, 34 N. Y. 670 (1), *Hadencamp v. Second Ave. R. R. Co.*, 1 Sweeney, 490; *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596 (2). The question is one of fact for the jury, taking into view all the circumstances of the case. *Morrison v. Erie R. Co.*, 56 N. Y. 307 (3); *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239 (4); *Westchester & Phila. R. R. Co. v. McElwee*, 17 P. F. Smith, 311; *Meesel v. L. & B. R. R. Co.*, 8 Allen, 234 (5); *Wharton on Negligence*, § 366. That must necessarily be the rule in a case like the present. Not only was no notice, such as required by the statute, given to the passenger, forbidding him from riding on the front platform, but he was expressly permitted so to do by the act of the conductor in taking his fare while in that position, and the proven custom of the company to require passengers who were smoking to ride on that platform. If there has been any doubt about this question, it may now be deemed settled that where the notice required by the statute is not given, it is not *per se* negligence for a passenger to ride on the front platform of a street car.

It is further claimed that no negligence of the defendant was shown. It must be freely confessed that the evidence, taken altogether, is very unsatisfactory; but that is not the question here. It comes up in the form of a motion for a nonsuit which was denied, and that ruling must be sustained where the evidence is conflicting and the inferences to be drawn are doubtful. *Belton v. Baxter*, 58 N. Y. 415; *Cook v. N. Y. Cent. R. R. Co.*, 3 Keyes, 476; *Ochsenbein v. Shapley*, 84 N. Y. 214. On behalf of the plaintiff, it was shown that the driver suddenly whipped one of his horses; that the animal plunged terribly under the blow, first forward, and then to one side; that a jar occurred which, coming without warning, threw the plaintiff off; that the driver attempted to stop the car by apply-

1. See note of this case on page 617, *ante*.

2. Reported in this volume, page 623, *ante*.

3. *Morrison v. Erie R'y Co.*, 56

N. Y. 307, is reported in 5 Am. Neg. Cas. 193.

4. See note of this case on page 446, *ante*.

5. Note of this case on page 446, *ante*.

ing the brake, but failed because the brake-chains were twisted up, and the brake kicked out of his hand, and, before he could stop the car, the plaintiff was run over and injured. Assuming these facts to be true, there was enough to put the company upon its defense and carry the case to the jury. Inferences of negligence from the conduct of the driver in managing his team and the condition of the brake-chains were possible. These facts were very strongly contradicted, but we have no warrant to decide the question of fact.

An exception was taken to the ruling of the court permitting a witness to be asked on his cross-examination if he had been expelled from the fire department. The question was improper, because the fact sought to be proved was neither pertinent to the issue, nor did it relate to any specific fact which tended to discredit the witness, or impeach his moral character. *People ex rel. Phelps v. Oyer & T. of N. Y.*, 83 N. Y. 460. If the witness had simply answered in the affirmative the error might have been harmful, as leading the jury to suspect something neither true nor proved; but he answered that he was expelled for being absent without leave, and on that charge alone. Of course no unfavorable inference could be drawn, and we do not see how any harm could possibly have resulted from the ruling.

We think the judgment must be affirmed, with costs. All concur.

HAYES v. FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY.

Court of Appeals, New York, November, 1884.

[Reported in 97 N. Y. 259.]

RIDING ON FRONT PLATFORM OF STREET CAR.—Where the plaintiff stood upon the front platform of a street car although there were vacant seats inside, and when the car stopped to receive other passengers who entered by the front platform, the plaintiff to facilitate their entry stepped down on the front step, and as he was stepping up again after they got on the front platform “the car gave a sudden movement and pulled up” and he was thrown out sideways and injured, there was no evidence of negligence on the part of the company and a judgment entered on a verdict for the plaintiff was reversed.

APPEAL from judgment of the General Term of the Supreme Court, in the Second Judicial Department, entered upon an order

made the second Monday of December, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial. The facts appear in the opinion. *Judgment reversed.*

FRELING H. SMITH, for appellant.

H. D. BIRDSALL, for respondent.

Finch, J. — The defendant company makes two objections to the recovery in this case. Upon proof that the notice required by the General Railroad Act was posted in the car, and that plaintiff was riding upon the platform and was upon the step when injured, in disregard of that notice, his contributory negligence was asserted. In *Nolan v. Brooklyn City & Newtown R. R. Co.*, 87 N. Y. 63 (1), we did not decide that the provision of the General Railroad Act referred to applied to street railroads. It was enough in that case, that if it did, the notice proved was insufficient, and that was the only answer deemed necessary to the argument founded upon the statute. Nor need we decide that question now, since we think the second objection taken by the appellant, that there was no evidence of negligence on the part of the defendant company, is well founded.

On New Year's day of 1881 the plaintiff, after having partaken liberally of intoxicating drinks, but claiming, nevertheless, to have been entirely sober, went upon a street car of defendant at Forty-second street in the city of New York, for the purpose of riding down town. He took his position upon the front platform, when there was room and were vacant seats inside of the car; while thus riding on the platform his fare was collected by the conductor without remonstrance or objection.

The car stopped at Twenty-third street to permit four persons to come upon it as passengers, one of whom was a lady, and all of whom entered by way of the front platform. The plaintiff stepped down upon the front step, as he says "to give these passengers better facility for getting in," and then, he adds: "I was in the act of stepping up again after they got on the front platform, when the car gave a sudden movement and pulled up, and I got thrown out sideways." This is the sole and only evidence upon which any negligence of the company can be founded. What the plaintiff said about an elevation of the rail along the curve he admitted might have been the riser or flange upon which the wheels do not run, and that such was the case was proved beyond any possibility of doubt. It is not shown that the driver of the car started his horses in any un-

1. See preceding case reported.

usual or negligent manner. The plaintiff does not so testify, and standing where he did upon the front platform it was possible for him to see and observe. That the car "gave a sudden movement" is entirely consistent with the supposition that, having been still, the horses were started in a careful and prudent manner; for a car loaded with passengers must necessarily require a strong pull of the horses to overcome its resisting inertia, and such must be a thing of constant occurrence and unavoidable. The strong effort of starting relaxes as momentum is gained and the car moves easily, and this is what the plaintiff evidently means by the phrase "and pulled up," unless he refers to its stoppage after he fell off, for it is entirely certain that, after starting, the car did not stop until the accident had occurred, and stopped on account of that. The plaintiff, therefore, gave no evidence which even tended to show that there was any negligence on the part of the company. He must prove something which warrants that inference, and not leave his case upon facts just as consistent with care and prudence as with the opposite. *Baulec v. N. Y. & Harlem R. R. Co.*, 59 N. Y. 357.

The judgment should be reversed and a new trial granted, costs to abide the event. All concur, except DANFORTH, J., dissenting, and RAPALLO, J., absent.

Judgment reversed.

WERLE, ADMINISTRATOR, V. LONG ISLAND RAILROAD COMPANY.

Court of Appeals, New York, March, 1885.

[Reported in 98 N. Y. 650.]

DUTY OF RAILROAD TO FURNISH PASSENGERS SAFE PLACE TO RIDE.—The stoppage of a train at a regular station is an invitation to the public to take passage thereon and the sale of tickets for passage on that train binds the railroad company to furnish a safe and secure place for its passengers to ride and an omission to do so is evidence of negligence.

THROWN FROM RAILROAD CAR PLATFORM—NEGLIGENCE.

—Where a passenger could not find a seat in a train and took a position with others on a car platform without objection from any of the employees who failed to point out any seat for him to occupy, and the passenger was thrown from the car as it was rounding a curve at great speed he was not as matter of law guilty of contributory negligence, and a verdict for the plaintiff in an action for his death would not be disturbed.

"THIS was an action to recover damages for alleged negligence causing the death of Jacob P. Werle, plaintiff's intestate.

"The deceased took passage on a train on defendant's road at East New York for Manhattan Beach. The cars were crowded, and failing to find a seat, he, with others, stood on a platform of a car. Other passengers were standing between the seats and on other platforms. The train, on turning a curve, ran at great and increased speed. The car, in consequence, gave a sudden lurch, and the deceased was thrown from the platform and killed."

The mem. of opinion is as follows:

"The stoppage of the train at East New York, one of its regular stations, constituted an invitation to the public to take passage thereon. The sale of tickets by the defendant at that station for passage on that train bound it to furnish a safe and secure place for its passengers to ride, and comfortable accommodations for their convenience. Proof of its omission to do so, whereby the plaintiff's intestate was obliged to ride in an unsafe place on the platform of the car, and the speed with which they ran over the curves when the accident occurred, furnished sufficient evidence from which the jury were authorized to find the fact of defendant's negligence. This is not questioned by the appellant, but he contends that the evidence shows contributory negligence on the part of the plaintiff's intestate.

"There was evidence tending to show that the deceased got onto the train at a way station, that he looked for seats before getting on, and could find none, and then took up a position with his companion and others on the platform of a car. Other passengers were also riding upon the platforms of other cars, and many were standing up inside the cars between the seats. No servant of the defendant pointed out any seat for him to occupy, or objected to the position which he had taken on the car. The evidence tended to show that the accident occurred in consequence of a sudden lurch given to the car by the great and increased speed with which it struck and turned the curve. This motion of the car was described by some of the witnesses as of considerable violence, and one of them stated that he would have been thrown to the floor if he had not caught and been sustained with both hands by the seats. One witness testified that the motion of the car sent the deceased flying through the air, and another that it threw him off up into the air.

"This evidence tended to show an unusual and dangerous movement of the cars, and bore strongly upon the question of contributory negligence.

"The evidence was conflicting as to whether the deceased was standing near the center or on the edge of the platform at the time of the accident, and it was silent as to whether he was holding to anything at that time.

"While the evidence as to many of the facts was conflicting, we think there was nothing proved in the case for which the court have the right, as a question of law, to attribute contributory negligence to the deceased, and that the whole case presented simply questions of fact for the consideration of the jury. *GINNA v. Second Ave. R. R. Co.*, 67 N. Y. 596 (1). Under such circumstances we have no right to disturb their verdict, and the judgment should be affirmed."

ALFRED C. CHAPIN, for appellant.

WILLIAM A. COHEN, for respondent.

Per Curiam. Memorandum for affirmance. All concur. Judgment affirmed.

PALMER V. PENNSYLVANIA COMPANY.

Court of Appeals, New York, November, 1888.

[Reported in 111 N. Y. 488.]

RAILROAD CORPORATION NOT INSURER—LIABLE ONLY FOR NEGLIGENCE OF DUTY.—A railroad corporation is not an insurer of the safety of its passengers, and in order to render it liable for injuries it is essential to show that it neglected the performance of some duty, which, in the exercise of reasonable care, prudence and diligence, it owed to such passengers.

PASSENGER FALLING FROM ICY PLATFORM OF CAR—CONTRIBUTORY NEGLIGENCE.—Where it appeared that when the train arrived at a station the plaintiff slipped and fell from a car platform that had a small quantity of snow and a smaller quantity of ice upon it, that had accumulated during the night run and that the platform was well constructed with hand rails on each side, there was not sufficient evidence to charge the defendant with negligence, but, even admitting that it was negligent, the fact that the plaintiff had been upon the platform two or three times previous to the accident and knew of its slippery state and was walking upon it without using the hand rails would charge him with contributory negligence.

APPEAL, from judgment of the General Term of the Supreme Court, in the Second Judicial Department, entered upon an order made December 20, 1886, which affirmed a judgment in favor of

1. Reported in this volume, page 623, *ante*.

plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial. The facts appear in the opinion. *Judgment reversed.*

HOMER A. NELSON, for appellant.

GRANT V. TAYLOR, for respondent.

Ruger, Ch. J. — The evidence was quite conflicting as to the presence of any ice on the platform of the car from which the plaintiff fell and broke his leg, and as to the quantity of snow lying thereon; some of the witnesses stating that there was no ice and only so much snow as had apparently been blown in and gathered around the corners and crevices of the platform; and others saying there was some ice formed on the edges of the platform from sleet, hail or rain freezing there, and being thinly covered with a coating of snow. It had stormed at various times during the night and morning, and the weather was cold and freezing. Whatever may have been the testimony, it is quite certain that the quantity of either ice or snow, was quite inconsiderable, and perceptible only after some inspection. It also appeared that, such as it was, it had been formed upon the platform of a passenger car attached to a through train running from Chicago to Fort Wayne in the course of its transit between those places. The plaintiff had taken his passage at Chicago for a place beyond Fort Wayne, and had been upon the cars about twelve hours, when about five A. M., they arrived at Mansfield, in the State of Ohio, where the accident occurred.

The jury were undoubtedly authorized to find from the evidence, that there was some snow upon the car platform and some slight spots of ice around its edges, and that the accident was occasioned by the slipping of the defendant on the platform by reason of such ice or snow. There is no claim that there were hummocks or bunches of either substance, or that it lay in any other form than as a thin covering upon the platform.

It was also established by the evidence of the plaintiff that he was aware of the condition of the platform at the time of the accident, as he had two or three times during the night crossed over it and observed that it was slippery.

The amount of the verdict rendered in the case is quite reasonable, and as the plaintiff was undoubtedly seriously injured, and was subjected to damage by reason thereof, we should be quite willing to affirm the judgment if it could be done without violating legal principles.

Railroad corporations, however, are not the insurers of the lives

or safety of passengers upon their cars, and in order to render them so, it is essential to show that they have neglected the performance of some duty, which, in the exercise of reasonable care, prudence and diligence, they owe to such passengers.

We think the trial court was not justified in applying to this case the rule pertaining to the construction and maintenance of tracks and running machinery by railroad corporations, which holds them to the use of the utmost possible care in discovering and remedying defects therein. That rule is applicable to such appliances of a railroad as would be likely to occasion great danger and loss of life to the travelling public, if defects existed therein on account of the velocity with which cars are moved, and the destructive and irresistible force which accompanies such motion.

No claim is made here but that the roadbed was in good order; the cars constructed upon the usual and customary plan, and provided with all of the conveniences and appliances ordinarily used to afford safety and comfort to their occupants. It had a safe and well-constructed platform, with proper and convenient steps to enable passengers to safely enter or alight therefrom, and hand rails on either side to afford assistance in case of any insecurity in the footing of the passageway. The accident occurred from a cause which is as common to all other exposed places, as to that of a car platform, and which is inseparable from the nature of a northern climate.

Persons who suppose that they are freed from the exercise of reasonable care and prudence in passing over places exposed to ice and snow in such a climate as ours, upon the assumption that a duty belongs to some other person to keep such place, under all circumstances, absolutely free therefrom, greatly mistake the legal obligations resting upon the parties respectively interested.

The rule laid down by the trial court in *Weston v. New York Elevated R. R. Co.*, as approved in 73 N. Y. 595 (1), in reference to a permanent platform at an elevated railroad station in the city of New York, was that "the defendant was not bound to keep its platform in such a condition that it would have been impossible for any passenger to slip, but in such a condition that a person using ordinary care, which people use when not apprised of danger, would not slip." This was applied in a case where the snow had fallen long before the accident, and an effort had been made by the railroad company to

1. Reported in this volume, page 587, *ante*.

remove it, but it had imperfectly performed that duty. We think even such a rule is not applicable to the removal of snow and ice on cars attached to a railroad train in course of transit, travelling in the night, during a continuous storm. The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travellers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations, or the termini of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so.

We are not referred to any case laying down the precise degree of care and diligence required of such corporations under such circumstances, but we think it must be somewhat analogous to that imposed upon municipal corporations, in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accumulations of snow or ice in a street or public place within a reasonable time after they have occurred; but they are not to be deemed negligent if they do not remove all traces of such obstructions, when they do not constitute something more than the presence of a danger, arising alone from their inherent quality of being slippery. *Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. City of Troy*, 108 N. Y. 570; *Kaveny v. City of Troy*, 108 N. Y. 572.

The theory upon which the learned trial judge denied the motion for a nonsuit in this case is undoubtedly expressed in his charge to the jury, in which he says: "If you will pay attention you will understand the enormous responsibility which such a company assumes. The duty it owes the public is the *utmost possible care* to anticipate future accident or disaster, and the *utmost possible prudence* in guarding against it."

Although this portion of the charge was unexcepted to by the defendant, and is, therefore, unavailable to it as an error of law upon this appeal, it may yet be taken as an expression of the views enter-

tained by the court in respect to the law, in refusing to grant the motion to nonsuit presented by the defendant.

It is quite impossible to lay down any general rule applicable to all circumstances, in respect to the degree of care to be observed by a railroad corporation in the removal of ice or snow from its cars, and each case must, therefore, be generally determined by its own peculiar circumstances; but it is safe to say that such corporations should not be held responsible for the dangers produced by the elements until they have assumed a dangerous form, and they have had a reasonable opportunity to remove their effects.

Having arrived at the conclusion that the case presented no facts as to the negligence of the defendant, which a jury were justified in regarding as proof of negligence, we deem it unnecessary to discuss at length the question of the alleged contributory negligence of the plaintiff. A problem not free from doubt is presented by a verdict, adjudging the defendant guilty of negligence in not observing the danger arising from the presence of snow and ice upon a platform, and yet exonerating the plaintiff from the imputation of contributory negligence in view of the fact that he knew that ice and snow had accumulated on the platform; that he had twice slipped there the same night, and thereafter walked fearlessly over it without availing himself of the protection of hand rails within his reach on both sides of the platform. The same duty which rested upon the defendant to see and remove this obstruction rested upon the plaintiff, with still greater force, to guard himself from injury while passing over it, because he had been informed by experience of its presence and danger, and as the storm continued until the train reached Mansfield, he should have known that no reasonable opportunity had been afforded the railroad company to effectually remove it.

The judgments of the courts below should, therefore, be reversed, and a new trial ordered, with costs to abide the event. All concur.

LEHR V. STEINWAY AND HUNTER'S POINT RAILROAD COMPANY.

Court of Appeals, New York, February, 1890.

[Reported in 118 N. Y. 556.]

NEGLIGENCE OF CARRIER.—The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated and due care avoided is negligence on the part of a carrier.

PUSHED FROM PLATFORM BY OTHER PASSENGERS—NEGLIGENCE.—A passenger who, with his wife and a crowd of other people, boarded a street car and he succeeded in securing a seat which he gave to his wife, and after the car started took a position on the rear platform, which he retained for a short time, and after notifying the conductor of his intention, stopped from the back platform and walked along the side of the car to the front platform, which was so crowded that he could only obtain foothold on the lower step, holding on by the rail on either side, and from which position he was pushed by a movement of the passengers and fell under the wheels of the car and was injured, is not guilty of negligence as matter of law, and that question and whether the railroad company was negligent in carrying so many passengers were for the jury.

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made May 11, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion to set aside a verdict and for a new trial. The facts appear in the opinion. *Judgment affirmed.*

GEORGE W. WINGATE, for appellant.

LOUIS S. PHILLIPS, for respondent.

Follett, Ch. J. — In 1886 the defendant owned and operated with horses a street railroad, extending from the ferry at Hunter's Point, eastwardly through Long Island City. Between three and four o'clock in the afternoon of Sunday, July 18, 1886, the plaintiff, accompanied by his wife, and by a girl about seven years old, and her father, stood waiting at the ferry (the western end of defendant's line), to take a car for Bowery Bay Beach, a pleasure resort on the line of the road. More persons were waiting for a car than could be carried. A car approached from the east, and, as soon as its passengers were discharged, the plaintiff pressed forward and secured a seat for the purpose of giving it to his wife, who, by reason of an injury, was unable to stand and sustain herself by grasping a rod or strap. When his wife entered the car he gave his seat to her, and she took and carried the girl on her lap until the plaintiff was injured. The plaintiff remained standing by his wife until their fares were collected. His friend, the father of the girl, found standing room on the front platform, where he rode until after the accident. After the plaintiff had paid the fares, he made his way to the right side of the rear platform, where he rode for awhile, and afterward stood on one of the steps, steadying himself by holding onto the hand rail. This platform and the steps being crowded with passengers, and the plaintiff seeing that there was more standing

room on the front platform, stepped from the moving car and walked rapidly by the right side of it to the front platform, for the purpose of securing a better place to stand. This platform was so crowded that the plaintiff was unable to fully accomplish his purpose, but he boarded the car in safety, and stood with his left foot on the step and his right foot on the platform, and clung with his right hand to the rail of the dasher, and with his left hand to the hand rail at the end of the body of the car. After riding in this position for a short distance, a movement of the passengers on the platform broke the hold of his right hand, which he was unable to regain, and thereupon he was forced by the pressure of the crowd from the steps, and fell underneath the car, the wheels of which passed over and crushed his left leg, rendering amputation at the knee necessary. Before the plaintiff left the rear platform he asked the conductor to stop the car so that he might go to the front platform, but, receiving no reply, he, the conductor and one Norton stepped from the rear platform at about the same time, and walked by the side of the car for the purpose of reaching the front platform. His action and disclosed purpose were not objected to by the conductor or driver. After the plaintiff lost the support of his right hand, and before he fell, he called to the driver to stop the car, but he did not until the car had passed over him. There is some evidence that the front platform was so crowded that the driver could not readily and effectually operate the brake. These are the essential facts upon which the plaintiff bases his right to recover, and this court must regard them as established by the verdict.

The defendant moved for a nonsuit on the grounds that the plaintiff had failed to establish that defendant negligently caused the accident, and that he had not affirmatively shown that he did not negligently contribute to the accident. The motion was denied and the defendant excepted. The court ruled that there was no evidence that the road or car was defective, or that the defendant negligently employed an unskillful or incompetent conductor or driver; but instructed the jury that if they found that the defendant negligently permitted the car to be overloaded, and that the overloading caused the accident, the plaintiff could recover unless the accident was caused in part by some negligent act of his which was a contributing cause of the accident. The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated and due care avoided, is negligence on the part of a carrier. It clearly appears that the defendant undertook to carry more passengers than could sit and stand within the car, and that both platforms and their steps

were filled to their utmost capacity. The action of persons so crowded together, and the great force which they exercise, sometimes almost unconsciously on each other, is understood by carriers of passengers and their employees, and the court would not have been justified in nonsuiting the plaintiff and holding as a matter of law, that the exercise of reasonable foresight would not have led the defendant to anticipate that overcrowding this car and its platforms might render accidents like the one which befell the plaintiff, probable. Whether the defendant was negligent in carrying so many passengers was a question of fact for the jury.

The court properly refused to instruct the jury that the plaintiff was negligent in surrendering his seat to his wife and seeking a place on the platform. It cannot be held, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself, contributes to an injury caused by the carrier's negligence, but which would not have been received had he remained in his seat.

The evidence in respect to the speed of the car, and the circumstances under which the plaintiff attempted to enter on the front platform, would not have justified the court in ruling, as a matter of law, that the plaintiff contributed to his own injury by making the attempt, but properly left it, as a question of fact, for the jury.

Whether the plaintiff was crowded from his position by persons entering on the opposite side of the front platform for the purpose of being carried, or by some movement of those whose fares had been collected, does not very clearly appear. It is not asserted that any person willfully or intentionally crowded the plaintiff from his position, and *Putnam v. Broadway and Seventh Avenue Railroad Company*, 55 N. Y. 108 (1), and kindred cases, are not in point. The defendant made no attempt to show that persons entered on the car against the wish or protest of the conductor or driver, or that the rules of the defendant required that the car should not be overloaded, or that the conductor or driver made any attempt to prevent the car from being unduly crowded.

Whether the defendant negligently caused the injury to the plaintiff, and whether he negligently contributed to his own injury, were, under the evidence, questions of fact for the jury; and, finding no error in the submission of the case, the judgment should be affirmed with costs.

Judgment affirmed.

1. See note of *Putnam v. Broadway & Seventh Ave. R. Co.*, 55 N. Y. 108, in 8 Am. Neg. Cas. 553.

**MARKS (BY GUARDIAN) V. ROCHESTER
RAILWAY COMPANY.**

Court of Appeals, New York, May, 1895.

[Reported in 146 N. Y. 181.]

SUSTAINING VERDICT.—A verdict, if sustained, must be sustained upon the ground upon which the case was submitted to the jury and no other.

INJURED WHILE DRIVING HORSE AT REQUEST OF DRIVER.

—Where it was shown by the evidence that a boy eleven years of age was told by the driver of a one horse car to take the reins and drive the horse, that had been hitched to the rear end of the car, in order to take the car back to a switch so that another car could pass, it being a single track road, and the driver remained on the front platform to attend to the brake, and while the car was being thus operated some boys entered it and the driver ordered them off, and as they hurried to get off they jostled the boy that was driving, who lost his hold upon the reins, and he fell and was injured, an allegation in the complaint that the platform was an unsafe place, and that it was negligence to place the plaintiff upon it to drive the car, was not thereby sustained, and that being the only negligence charged in the complaint a verdict for the plaintiff was properly set aside.

SCOPE OF EMPLOYMENT—MASTER AND SERVANT.—The action of the driver was in the line of his employment, and if injury happened, which was the natural consequence of the employment of the boy, the company would be liable.

APPEAL from judgment of the General Term of the Supreme Court in the Fifth Judicial Department, entered upon an order made March 27, 1894, which reversed an order granting a new trial, and ordered judgment on a verdict in favor of plaintiff for \$7,000. The facts sufficiently appear in the opinion. *Judgment reversed.*

CHARLES J. BISSELL, for appellant.

EUGENE VAN VOORHIS, for respondent.

Andrews, Ch. J. — On the first trial the jury disagreed. The plaintiff on the second trial recovered a verdict for \$7,000, which the trial judge subsequently set aside for what he regarded as his own error in refusing a nonsuit. On appeal from the order setting aside the verdict, the General Term reversed the order and directed judgment on the verdict, which was entered, and this appeal is brought by the defendant from the order of the General Term and the judgment pursuant thereto. The complaint alleges that the plaintiff was engaged in assisting in the management of the car under the direc-

tion of the driver, and was placed on the rear platform to drive the horse, and while so engaged was crowded from the platform by persons who were leaving the car, and was thrown under the wheels and injured, and that the injury was caused by the negligence of the defendant. The only specification of negligence contained in the complaint is that the platform on which the plaintiff was stationed for the purpose of driving the horse was an unsafe and unfit place upon which to put a boy of his age to perform the duty imposed upon him.

The trial judge submitted to the jury two questions, *first*, whether there existed such an emergency at the time as to authorize the driver of the car to employ outside assistance to get the car back to the switch, and, *second*, if the jury found that such an emergency existed, whether he was negligent in placing a young boy, under the circumstances, upon the platform to drive the horse. The judge excluded from the consideration of the jury any claim of negligence other than the one set out in the complaint, and explicitly instructed them that unless they should find that the defendant was negligent in placing the plaintiff upon the platform to drive the horse, the action could not be maintained. The question whether the driver was guilty of negligence in ordering the other boys to get off the car while it was in motion was not submitted to the jury. The trial judge seemed to assume that if the defendant was negligent in employing the plaintiff, by reason of his tender years, and placing him on the rear platform to drive the horse, it was chargeable for all that subsequently happened, independently of the question whether a new agency had intervened, which was the proximate cause of the injury. He granted the motion for a new trial because, upon further consideration, he had reached the conclusion that there was no negligence in employing the plaintiff for the service to which he was put, and also for the further reason that assuming there was negligence in this respect, it was not the proximate cause of the injury. The General Term, in reversing the order granting a new trial, expressed the opinion that the question of the defendant's negligence in placing the plaintiff upon the car to drive the horse, in view of his age and inexperience, was properly submitted to the jury, and that the verdict upon that ground was justified, but the court also held that the verdict could stand upon another ground, namely the negligence of the driver in expelling the other boys from the car while in motion, in the manner disclosed by the evidence.

Whatever ground there might have been for presenting the case in this aspect to the jury, the verdict did not proceed upon that view.

This aspect of the case was not presented to or passed upon by the jury. They were not permitted to consider it as a ground of their verdict, because the case was, by the explicit direction of the judge, made to turn upon the one question of negligence in placing the boy on the platform to drive the horse. The verdict, if sustained at all, must be sustained on the ground upon which the case was submitted to the jury. It would be obviously improper to sustain it on an independent ground which the jury were not permitted to consider. The trial judge, after the conclusion of the main charge, in response to a request made by the defendant, but qualifying it, charged in substance that if the jury should find that the driver was authorized under the circumstances to employ the plaintiff to assist him, and that he was of sufficient age and experience to make it proper for the driver to employ him and place him in the position he did, the plaintiff was a co-employee and could not recover, although the driver was negligent in ordering the boys to leave the car while in motion. The judge in this, as in the main charge, made the liability to depend on the original negligence in employing the plaintiff and placing him on the rear platform to drive the horse.

The counsel for the defendant, on the trial, excepted to the submission to the jury of the question of the existence of an emergency which authorized the driver to procure outside assistance, and also to the submission of the question of negligence in employing the plaintiff to render the service required. The judge at the trial and the judge at General Term concurred in the view that an emergency existed which justified the driver in employing assistance to escape from the dilemma brought about by the meeting of the cars. It is not claimed that the driver had any general authority to employ servants for the defendant. If he had authority to employ assistance under the circumstances of the case, it was an authority outside of the general scope of his employment. Clearly he had no authority, express or implied, to call upon bystanders to assist him in the discharge of any service which he himself could reasonably perform. If third persons undertook upon his solicitation and for his convenience to assist him in extricating the car from the blockade, when he could have accomplished the work himself, no authority to employ assistance could be implied. Such an implication could only arise when, in view of all the conditions, the driver could not himself without assistance, having a proper regard for the safety of passengers and the care of the car, have undertaken to take the car back to the switch. It is obvious that the driver could not at the same time have managed the brake and driven the horse. The

driver of the other car had his own car and the horse to look after, and it does not appear that there was any other employee of the company in the vicinity to whom the driver of the car which was to be moved could have applied for assistance. While the evidence is not very direct or satisfactory as to the necessity for aid, we think that question was properly submitted to the jury. The defendant gave no evidence upon the point. The conduct of the driver indicates that, in his opinion, assistance was necessary, and the jury might reasonably have reached the conclusion upon the evidence before them, in the absence of any contradictory evidence, that there was an emergency which gave to the driver authority to call in outside aid on the occasion. The authority of a servant is not in all cases confined to the rendering of personal service. In every business and employment there are exigencies which are not anticipated, and which require a servant to act, in the absence of the principal, for the immediate protection of his interests, and he may do things in his interest when the emergency arises, which transcend his usual authority, and they will be deemed to have been authorized.

The jury having found that such an emergency existed in this case, the employment of the plaintiff to drive the horse was the act of the principal, and if his employment in this service directly by the principal would have been an act of negligence, his employment by the driver, acting for the time being in place of the master, was a negligent act imputable to the defendant. The service which the plaintiff was called upon to render was unquestionably intended to be a gratuitous service. He went upon the car in compliance with the request of the driver. If the service required of the plaintiff was a dangerous one for a boy of his age, from which personal injury to him might reasonably have been anticipated, the defendant might justly be chargeable if injury happened which was the natural consequence of the employment. The plaintiff, by reason of his youth and inexperience, might not appreciate the risk, and he would not be held to the exercise of the same discretion and judgment in entering upon the service as would be required of an adult. The question whether a child is *sui juris* generally arises in actions based on negligence, and where contributory negligence either of the child or his parents is relied upon as a defense. The plaintiff was, within the authorities, old enough to exercise some degree of care. But if such a boy was an unfit person to place upon the platform to drive the horse, on account of the danger of injury to which it would expose him, it would be for the jury to determine whether he knew the danger or was chargeable with negligence in accepting the em-

ployment. But we are of the opinion that there was no reasonable ground upon the evidence for saying that the rear platform of the car was an unsafe place to place the boy, or that there was any negligence in placing him upon it to drive the horse. The platform was three feet and more from side to side, and was separated from the horse by a dash or guard. If a man or boy should fall from the platform when the car was in motion, he would be in danger of being injured by the car, the platform not being of the same width as the track upon which the car ran. A person standing on the platform might fall from tripping, or from being jostled by persons leaving the car, or by reason of some obstruction on the track with which the car might come in contact, or from other causes which may be easily imagined. But the plain and practical question in this case was, whether any of these occurrences ought reasonably to have been anticipated as likely to happen if the boy should be put upon the platform to drive the horse back to the switch. We perceive no just ground for charging the defendant upon such an hypothesis. It was in no sense the case of putting a child at work upon a dangerous machine without instruction and warning. The plaintiff, as his evidence indicated, and as was stated to the jury, was a bright, intelligent lad, living on the street traversed by the defendant's cars. He was directed by his father to cut the ice from the sidewalk, and was engaged in chopping the ice when he was requested by the driver to go upon the platform to drive the horse. The horse, so far as appears, was tractable, and when he started to drive there was no apparent reason why he would not safely perform the services required of him. If the other boys had not got upon the car and commenced swaying it, there is no suggestion that any injury would have happened. It resulted from an unexpected and unanticipated conjunction of circumstances, not attending the ordinary use of the platform. The fact that by reason of the irruption of the boys, and their scurrying to get off the car upon the order of the driver, the plaintiff lost his hold upon the reins and he was jostled off the car, does not, we think, prove or tend to prove that the platform was an unsafe place, or that there was negligence in placing the plaintiff upon it to drive the car, and this, as we have said, is the negligence charged and upon which the case was submitted to the jury.

Upon the case as presented we are of the opinion that this question of negligence was improperly submitted to the jury and that the order and judgment of the General Term should be reversed and the order of the Special Term granting a new trial should be affirmed with costs to abide the event.

All concur, except Haight, J., not sitting.

Judgment accordingly.

VAIL V. BROADWAY RAILROAD COMPANY OF BROOKLYN.

Court of Appeals, New York, November, 1895.

[Reported in 147 N. Y. 377.]

STATUTE RELATING TO PASSENGERS ON PLATFORMS OF TRAINS DOES NOT APPLY TO STREET RAILROADS.—In an action to recover damages for injuries sustained by a passenger while riding upon the front platform of a street car it was held that § 46 of the General Railroad Law of 1850 (Laws 1850, c. 140, § 46) referring to passengers riding on platforms of cars, does not apply to street railroads, and judgment for plaintiff, who was injured while riding on platform of street car, affirmed (1).

“APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November 27, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying defendant’s motion for a new trial.

“This action was brought to recover damages for personal injuries sustained by the plaintiff in consequence of the alleged negligence of the defendant company in the operation of one of its street cars drawn by horses.

“The articles of association of the defendant company stated that the organization was under the Act of April 2, 1850 (the General Railroad Law), and also under chapter 303 of the Laws of 1858. Section 6 of the latter Act is as follows: ‘It shall be lawful for said Augustus Ivins, solely or with his associates, to organize under an Act of the Legislature, entitled “An Act to authorize the formation of railroad companies and to regulate the same,” passed April 2, 1850, and, in the event of such organization, all the provisions of said last-mentioned Act, except the number of persons designated in the first section thereof, shall apply to the said grantee and his associates, also except the provision of section 27 of said Act.’

1. The section referred to (Laws 1850, c. 140, § 46), is as follows:

“In case any passenger on any railroad shall be injured while on the platform of a car, or any baggage, wood, or freight car, in violation of the printed regulations of the company, posted up at the time in a con-

spicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers.”

"There was posted in the car on which the accident in suit happened, the following notice: 'Passengers are not allowed to ride on the front platform with the driver. Any passenger breaking this rule does so at his own risk.' Further facts appear in the opinion." *Judgment affirmed.*

PERCY S. DUDLEY, for appellant.

THOMAS E. PEARSALL (ISAAC M. KAPPER, with him), for respondent.

O'Brien, J.—The plaintiff recovered a verdict against the defendant for his damages sustained in consequence of a serious personal injury while riding in one of the defendant's cars as a passenger on the 20th of October, 1892. It is conceded that there was evidence of the defendant's negligence in the case sufficient to require its submission to the jury. It is quite clear also that upon the question of the plaintiff's negligence contributing to the injury, so far as that question depends upon general principles, and not upon special statutes, the case was one for the jury. The plaintiff was, at the time of the accident, riding upon the front platform of the car, smoking a cigar, which he had when entering it from the street.

The only question in the case which this court has the right to review is whether the action was defeated by the provisions of § 46 of the General Railroad Law of 1850. (Laws 1850, c. 140, § 46.)

That section reads as follows: "In case any passenger on any railroad shall be injured while on the platform of a car, or any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury; provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers."

The fact that the defendant has omitted to plead this statute as a defense would ordinarily be a sufficient answer to the point. When a railroad company in an action to recover damages by a passenger, sustained in consequence of a breach of the duty which the corporation owes to him as such, claims immunity under some provision of a statute it should plead all the facts upon which the immunity claimed rests. *Weymouth v. Broadway & Seventh Avenue R. Co.*, 2 Misc. Rep. 507; s. c., 142 N. Y. 681. But as this question was not raised at the trial, we prefer to dispose of the objection upon broader grounds. The question is whether this statute was ever intended to have any application to a street railroad. It is quite certain that the companies themselves have not so regarded it, since it

is a matter of common knowledge that they receive passengers every day when there is no place for them except upon the platforms, and have for years. The construction which such corporations themselves have for many years given to this statute should not be entirely disregarded when seeking for its true meaning, and when urged as a defense by one of the companies to an action in which it admits its own negligence. It may be conceded that the general language used is broad enough to cover the case, but words and language must, in the construction of a statute, always yield to what appears to have been the intention of the lawmakers. The literal meaning of words or phrases should never be permitted to pervert the purpose of the law, or to defeat the end which the legislature had in view, or to enlarge the operation of the law and extend it to subjects not within the legislative mind, or the evils intended to be remedied. When the intention of the law can be ascertained the courts will not allow this intention to be thwarted or perverted, because the proper words were not used, but all will be made to conform to reason and good discretion. (1 Kent, 462; *People ex rel., Jackson v. Potter*, 47 N. Y. 375.) The general purpose of the Act of 1850 was to provide for the operation of steam railroads. It is perfectly manifest and has always been conceded that many of its provisions can have no application whatever to street railroads. In the nature of things a provision of this character, intended primarily to prevent accidents and injuries to passengers on trains operated by steam and running at a high rate of speed, is not applicable to a street railroad, the cars of which are drawn through city streets at the rate of a few miles per hour. The danger to passengers standing upon the platform of steam cars when in motion is great and obvious, while that to passengers on the platform of street cars is almost nothing, as is fully demonstrated by the practice of the general public and the companies themselves. Moreover, the words employed in construing the section indicate quite clearly that what the legislature had in mind was riding on the platform of steam railroads. The section speaks of "*trains*," and of "*baggage, freight and wood cars*," terms which can have no application to the defendant. The notice required was to be posted in the cars "then in the train," an expression which never was in popular use with reference to street railroads. The use of the words "any railroad" cannot be permitted to control the meaning of the law, in view of the notorious fact that at the time of its enactment, or since, there is not the slightest reason to believe that the legislature apprehended any evil or danger from riding on the platform of street cars. To hold at this day

that a passenger riding on the platform of a street car, under the circumstances urged by defendant, is doing so at his own risk, because in violation of the statutes, would be to impose upon the public and the railroads themselves duties and obligations that have not heretofore been generally supposed to exist. Such a construction would unnecessarily extend the operation of the statute to cases and to a state of things manifestly not within its original scope or purpose.

We do not think that the incorporation in the defendant's charter of all the provisions of the General Railroad Law, with the exception of two sections mentioned, strengthens the defendant's position. All that was intended by that was that such portions of the general law as were applicable to street railroads should become a part of the charter. It was not intended by reference to the general law in the Act incorporating the defendant, to give to the section in question any other or broader application than that which was in the mind of the legislature when originally enacting it.

The law can mean nothing more when specifically made a part of the defendant's charter than it does as it appears upon the statute book, or as it came from the legislature in the first instance.

It appeared that one of the rules of the defendant corporation, in force at the time of the accident, was to the effect that "smoking on the closed cars is prohibited except on the front platform." It might well be held, we think, that this corporate regulation was intended to and did modify the notice posted in the car, and so operated as a waiver of any immunity conferred under the provisions of the general law referred to. The true construction of the provision of the Act of 1850 referred to was sharply involved in the case of *Butler v. Glens Falls, etc., R. R. Co.*, 17 N. Y. St. R. 565, and from the disposition of the case afterwards made in this court it is quite evident that it was held that it did not apply to a street railroad. 121 N. Y. 112 (1).

For these reasons the judgment should be affirmed, with costs.

1. *Butler v. Glens Falls, etc., R. Co.*, 121 N. Y. 112, is reported in 5 Am. Neg. Cas. 321, 325.

GRAHAM V. MANHATTAN RAILWAY COMPANY.

Court of Appeals, New York, April, 1896.

[Reported in 149 N. Y. 336.]

INJURY ON OVERCROWDED CAR PLATFORM OF ELEVATED RAILROAD TRAIN—UNCLOSED GATE—CONTRIBUTORY NEGLIGENCE.—Where the evidence showed that when an elevated railroad train that was so crowded that the gate on the platform of the car could not be closed, stopped at a station and the plaintiff was told by the guard to hurry up and get on if he was going, and the plaintiff got on, but owing to the crowd could not get any further than the platform, and when the train stopped at another station the plaintiff stepped off the car to allow another passenger to alight and then returned to his position on the car, and when the train was going around a curve there was a surging movement among the passengers, caused by the guard attempting to strike an intoxicated passenger, and the plaintiff, to save himself from falling from the car, attempted to take hold of the iron railing on the car, and his arm was caught between that railing and the one on the car in the rear, as the two cars came nearly together on rounding the curve, and was broken, there was evidence of negligence on the part of the company in not furnishing the plaintiff a safe place to ride, and also in not keeping the gate closed while the car was in motion, as required by statute, and in the action of the guard, which should have been submitted to the jury, and the fact that the plaintiff left the train momentarily to allow another passenger to alight did not change the relation of carrier and passenger, nor render him guilty of contributory negligence, as matter of law, in returning to the car platform, although he knew his position there to be dangerous.

APPEAL from judgment of the General Term of the Court of Common Pleas for the City and County of New York, entered June 6, 1894, upon an order made at the May Term, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court at a Trial Term directing the dismissal of the complaint, and also affirmed an order denying a motion to set aside the direction and for a new trial. The facts appear in the opinion. *Judgment reversed.*

GILBERT D. LAMB, for appellant.

EDWARD B. THOMAS, for respondent.

Martin, J. — On November 19, 1892, the plaintiff was injured while a passenger upon one of the defendant's trains. Early in the evening of that day he went to the defendant's station at Fifty-ninth

street, purchased a ticket and passed to the platform for the purpose of boarding an approaching train. When the train reached the station the platforms of the cars were crowded with passengers. One of the guards employed upon the train, who saw the plaintiff standing at the station, said: "Hurry up, get on if you are going; get on, we cannot wait all night." In compliance with that suggestion the plaintiff boarded the train and it started. Owing to the crowded condition of its platform the gate upon the car was not closed at any time before the accident. The plaintiff was required to remain upon the platform, as the crowd in the car prevented his occupying any other position.

At the corner of Fifty-third street and Ninth avenue the defendant's road curves to the east, and at the junction of Fifty-third street and Eighth avenue there is a station where the train stopped, and the plaintiff stepped to the platform to enable a passenger to get off, after which he immediately returned to his former position on the car. The streets are nearly at right angles at the corner of Fifty-third street and Sixth avenue, and the railroad turns south on a short and sharp curve into Sixth avenue. At that point the guard, whose position was between the car upon which the plaintiff was riding and the one in the rear, had a quarrel with one of the passengers who was intoxicated, and struck at him, the effect of which was to cause a movement of the crown upon the platform of the car that tended to crowd the plaintiff from the train, whereupon he made a quick, involuntary movement with his left hand to grasp the railing behind him. At that moment his arm was caught between the iron railings of the car upon which he was riding and the one immediately in the rear as they came nearly together in rounding this curve. The plaintiff's arm was broken, and he sustained injuries of a somewhat serious character.

Before the injury the plaintiff had no knowledge that any danger was to be apprehended from the proximity of these railings when the train was making the curve at this point in the defendant's road, nor was he informed by any of the defendant's employees of such danger. Upon his cross-examination he, however, testified that when he returned to the car he knew the position upon the crowded platform was dangerous. It is manifest, therefore, that the plaintiff at that time recognized his peril so far as it arose from a crowded condition of the car and platform, but had no reason to apprehend any danger of the character of that which was the immediate cause of his injury.

The action was for negligence. Upon the trial the plaintiff was

nonsuited. The motion was based upon the ground that he had not established a cause of action, in that he had failed to prove negligence upon the part of the defendant and absence of negligence upon his own part. To this ruling the plaintiff duly excepted. Upon appeal to the General Term the judgment was affirmed, upon the ground that the plaintiff was guilty of contributory negligence in returning to the car after he had alighted at the station at Fifty-third street and Eighth avenue.

Thus the question is presented whether the evidence and any proper inferences that might have been drawn from it were sufficient to justify the court in submitting the questions of the defendant's negligence and the plaintiff's freedom from contributory negligence to the jury for its determination. If the proof was such as to authorize the court to hold, as a matter of law, either that the defendant was free from negligence or that the plaintiff was guilty of contributory negligence, then the judgment must be affirmed.

The stopping of the train at Fifty-ninth street was an invitation to the plaintiff to take passage thereon. There was also an express invitation by one of the defendant's employees. The defendant was, therefore, bound to furnish the plaintiff a safe place to ride. Proof of the omission to do so was evidence tending to show the defendant's negligence. *Werle v. L. I. R. R. Co.*, 98 N. Y. 650 (1). Again, the defendant's disregard of the statute which required gates upon every passenger car used upon its elevated railroad, and that they should be kept closed while the car was in motion, was also evidence of its negligence. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *McRickard v. Flint*, 114 N. Y. 222, 226. Moreover, the action of the defendant's servant in so conducting himself as to cause the crowd upon the platform to sway and jostle the plaintiff to an extent that induced him to seize the rail to retain his position on the car, was also evidence tending to show negligence in the defendant. The exposure of a passenger to danger, which the exercise of a reasonable foresight would have anticipated and due care avoided, is negligence on the part of a carrier, and whether the overcrowding of cars is negligence is a question of fact. *Lehr v. S. & H. P. R. R. Co.*, 118 N. Y. 556 (2). The evidence in this case was clearly sufficient to require the submission to the jury of the question of the defendant's negligence.

The respondent, however, urges that the plaintiff was guilty of

1. Reported in this volume, page 629, *ante*.

2. Reported in this volume, page 635, *ante*.

contributory negligence, as a matter of law, and upon that ground it seeks to uphold the judgment. This contention is based upon the plaintiff's evidence to the effect that the car and platform were crowded when he first boarded the train and that he knew it was a bad place to ride, and thought it was dangerous when he got on at the Eighth avenue station. The plaintiff, by momentarily stepping to the platform to permit another to alight, did not change his relation as a passenger upon that train, nor did his return render him guilty of contributory negligence as a matter of law. In *Willis v. Long Island R. R. Co.*, 34 N. Y. 670, 683 (1), it was held that a passenger was not to be deemed guilty of negligence for standing upon a platform of car in motion, where there were no vacant seats in the car. In that case it was said: "As the defendant in the present case neglected that duty (to furnish proper seats inside its cars), and the plaintiff rode on the platform because the company did not provide him with suitable and reasonable accommodation within the cars, the circumstance of his being in that position when he was injured does not relieve the defendant from liability." See also, *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596; *Nolan v. Brooklyn City & Newtown R. R. Co.*, 87 N. Y. 63 (2), and *Merwin v. Manhattan Railway Co.*, 48 Hun, 608 (3). The case last cited was an action in many respects similar to this, and, on the argument of the appeal, it was urged that a verdict should have been directed for the defendant upon the ground that the plaintiff was guilty of contributory negligence in boarding a car, when it was perfectly obvious that he would have to stand upon the platform. It was, however, held, that even if it was obvious to the decedent that he would not be able to find a place inside of the car, yet, the defendant by taking him upon the train for the purpose of transporting him as a passenger upon the platform, was bound to exercise a high degree of care to make the platform safe for his occupation, and he was entitled to assume that it would. This case was subsequently affirmed by the Court of Appeals, 113 N. Y. 659. The cases cited tend to sustain the doctrine that the plaintiff by boarding the defendant's train, although the car and platform were crowded, was not, as a matter of law, guilty of contributory negligence. We think the question of contributory negligence should have been submitted to the jury, especially in view of the fact that by the action of an employee of the

1. See note of this case on page 617, *ante*. and 624, *ante*.

2. The *Ginna* and *Nolan* cases are reported in this volume, pages 628

3. *Merwin v. Manhattan R'y Co.*, 48 Hun, 608, is reported in 5 Am. Neg. Cas. 441.

defendant in quarreling with and striking at a passenger, an unusual movement by the crowd was occasioned which naturally induced the act of the plaintiff that resulted in his injury. Even if the plaintiff assumed the ordinary risk which attended riding upon the platform, he had a right to assume that the defendant's servants would cause no unusual disturbance of the crowd, and that the cars were so constructed as not to render his position dangerous from their proximity to each other in passing over any portion of the road, or at least if such danger existed that he would be apprised of it.

These considerations lead to the conclusion that the question of the defendant's negligence and the plaintiff's freedom from contributory negligence were questions of fact which should have been submitted to the jury, and that the court erred in granting the defendant's motion for a nonsuit.

For this error the judgment and order appealed from should be reversed, and a new trial granted, with costs to abide the event.

O'BRIEN, HAIGHT and VANN, J.J., concur; ANDREWS, CH. J., GRAY and BARTLETT, J.J., dissent.

Judgment and order reversed.

FALLING FROM FRONT PLATFORM OF STREET CAR—CONTRIBUTORY NEGLIGENCE.—In **Bradley, Adm'r, v. Second Avenue Railroad Co.**, 90 Hun, 419 (1895), the facts of the case are stated by PARKER, J., as follows: "On the evening of January 28, 1895, plaintiff's intestate boarded one of defendant's cars on Second avenue, near Twenty-seventh street. Although there was ample room for him on the inside of the car, he went out on the front platform, and there remained standing until the car reached Sixty-third street, when he fell off, was run over, and received such injuries that he died about a week later. The theory of the plaintiff upon the trial was that the defendant was guilty of negligence causing the injury, in that the driver, without necessity for it, so suddenly applied the brake as to cause the car to give a violent jerk, which had the effect of hurling plaintiff's intestate over the dashboard. The only evidence in support of this position was given by the witness Carroll, who testified that he was riding in the car, and that, 'just about Sixty-third street, this here driver, it was just as if he put the brake on, and then he let the brake out, and the car gave a good jerk,—what I would could call a good one, anyway; and after that I seen this man going over the dashboard. I seen him myself.' While the witness says he saw the intestate going over the dashboard, he does not testify that he saw the driver apply

the brake, but asserts, instead, that the jerk which he experienced seemed to him as if the driver had put the brake on, and then let it off. Again he describes the jerk in the following language: 'It was just as if there was a rock or something on the car track, or anything like that.' We do not think this evidence was sufficient to authorize the jury to find that the defendant's servant was guilty of negligence in applying the brake so suddenly and sharply as to cause plaintiff's intestate to be hurled from his position on the platform.

"We are also of the opinion that the plaintiff failed to sustain the burden resting upon him, of proving that plaintiff's intestate was free from contributory negligence, within the principle established in the following cases: *Clark v. Railroad Co.*, 36 N. Y. 135; *Hayes v. Railroad Co.*, 97 N. Y. 259; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 108; *Coleman v. Second Ave. R. R. Co.*, 114 N. Y. 612; *Cassidy v. Atlantic Ave. R. R. Co.*, 9 Misc. Rep. 275. This is not a case where plaintiff's intestate, by reason of the crowding of the car, was obliged to go upon the front platform. On the contrary, it conclusively appears that there was plenty of room on the inside of the car. No one was standing up in the car, and he could have had a seat, had he chosen to take one. Instead, he passed out upon the front platform,—a place obviously more dangerous at any time than the inside of the car, but especially so on this occasion, in view of the slippery condition of the tracks, the storm, and the darkness, which made it probable that sudden stoppages of the car would occur. It was a cold night, the thermometer being only twenty degrees above zero; the tracks were icy and slippery; and it was snowing steadily during all of the time that he was upon the car. To the situation we have described, the language of the court in *Coleman v. Railroad Co.*, *supra*, applies:

"The seats in railroad cars are provided for the passengers to occupy. If, without reasonable cause, they leave the car, or place themselves on the outside of it, when in motion, they assume the hazards of so doing."

"But in that case the plaintiff offered as an excuse that the seat which he occupied became so crowded as to render it uncomfortable for him to remain in it, and so he stepped down upon the step, which ran lengthwise of the car, for the purpose of going forward to take another seat, and while doing so was injured, and it was held that from this evidence the conclusion was permitted that he had reasonable cause for leaving his seat to obtain another. And, continued the court, 'it is upon that assumption that he may be relieved from

the charge of contributory negligence.' If in this case the car had been crowded so that it became necessary for plaintiff's intestate to go upon the platform, there would have been permitted an excuse which would have made it a question for the jury whether he was free from contributory negligence. But the facts show no excuse whatever. He left an absolutely safe place to go into one more hazardous at all times, but especially so on the occasion in question. And it was necessary for plaintiff to prove something more than this act of carelessness in order to authorize a jury to find that the plaintiff had sustained the burden resting upon him, of showing that he was free from contributory negligence. The judgment should be reversed, with costs to the appellant to abide the event." Judgment reversed. **PAYSON MERRILL**, appeared for appellants; **SUMNER B. STILES**, for respondent.

On a subsequent trial of this case judgment for plaintiff was reversed. 34 App. Div. 284 (1898).

NOTE OF NEW YORK CASES RELATING TO PERSONS INJURED ON PLATFORMS OF TRAINS AND STREET CARS.

Among other actions relating to Accidents on Platforms of Trains, etc., are the following :

In **CLARK v. EIGHTH AVENUE R. R. Co.**, 36 N. Y. 135 (1867), judgment for plaintiff for \$450 affirmed, in action for damages for injury sustained while riding on front platform of street car, by coming in contact with horse and cart and being thrown from platform. Plaintiff was not negligent in riding upon platform where it was shown that he was there with consent of conductor. (Affirming 32 Barb. 657.)

In **COLEMAN v. SECOND AVENUE R. R. Co.**, 114 N. Y. 609 (1889), judgment for plaintiff for \$981 reversed, where it appeared that plaintiff in changing his seat in open street car walked along side step of car, and in doing so came in contact with elevated railroad pillar and was injured, it being held that he was guilty of contributory negligence.

In **CRAIGHEAD v. BROOKLYN CITY R. R. Co.**, 123 N. Y. 391 (1890), judgment for plaintiff for \$1,000 was reversed, where plaintiff, while standing on outside step of open street car, was struck by car coming in opposite direction on other track. Held, that defendant was not bound to so construct its tracks that it would be impossible for a passenger to reach another car while he was standing on the outside of an open one. Neither was it negligence on conductor's part in failing to prevent plaintiff from going on the step or in failing to warn him of any possible danger which might arise therefrom.

IN *SCHREINER v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 42 N. Y. Supp. 163 (1896), plaintiff, a boy about eleven years old, was on the platform of a car on defendant's train as the train entered the station, when a sudden stoppage of the train threw him off the platform. Judgment for plaintiff affirmed. On the question of contributory negligence the court (per *RUMSEY, J.*) said: The jury "might have found from the evidence that the plaintiff took his seat in the car, and there remained until the car had entered the station; that he did not arise from his seat until adult passengers had done so, and had started to go upon the platform, in anticipation of the stoppage of the train; and that he followed the adult passengers out upon the platform, and stood there, awaiting the time when he might safely get off the car. As everyone knows, such a movement of passengers always occurs just after the train has drawn into the station; and it cannot be said, as a matter of law, that a boy of that age was guilty of contributory negligence in doing that thing which is the custom of many passengers, and which he himself saw was done by adult passengers under the same circumstances. However negligent it might be for an adult person to stand upon the platform of a moving train, although within the walls of the station, it cannot, we think, as a matter of law, be said to be negligence on the part of a boy of this age to do it, when, in doing so, he merely followed the lead of grown persons who did the same thing. Such was the view taken by the learned judge at the circuit, and such, we think, was a proper view for him to take."

IN *GARBACZEWSKI v. THIRD AVE. R. R. Co.*, 39 N. Y. Supp. 33 (App. Div. 1896), judgment for plaintiff was affirmed, in action for damages for injuries sustained by being thrown from platform of defendant's street car in consequence of a jolt or lurch occasioned by a defectively constructed curve. The car was an open one, and when plaintiff got on, he stood for a moment on the platform getting his fare ready for the conductor, and while there the jolt occurred which threw him off the car.

IN *SIAS and BAUN, Admr's, v. ROCHESTER R. R. Co.*, 92 Hun, 140 (1895), plaintiff's intestate, while standing on the platform of an electric street car, was struck on the head by a tree adjacent to the railroad track, from which injuries he subsequently died. From the facts it appeared that the intestate left his seat in the car, and while on the platform put his head beyond the side of the car and came in contact with the tree. *HARDIN, P. J.*, was of opinion that the intestate was guilty of contributory negligence and that judgment of nonsuit should be affirmed, but his associates being of opinion that the questions of negligence and contributory negligence should be submitted to a jury, judgment was reversed and new trial ordered. (The court reviewed many authorities, among them *Nolan v. Brooklyn City & N. R. R. Co.*, 87 N. Y. 63; *Goodrich v. Penn. & N. Y. Central R. R. Co.*, 29 Hun, 50; *Werle v. Long Island R. R. Co.*, 98 N. Y. 650; *Ginna v. Second Avenue R. R. Co.*, 67 N. Y. 596; *Willis v. Long Island R. R. Co.*, 34 N. Y. 670; *Francis v. N. Y. Steam Co.*, 114 N. Y. 380; *Webster v. R., W. & O. R. Co.*, 40 Hun, 161;

Vail *v.* Broadway R'y Co., 6 Misc. Rep. 20; Gibson *v.* Erie R'y Co., 63 N. Y. 454; Clark *v.* Eighth Ave. R. R. Co., 36 N. Y. 138; Holbrook *v.* Utica & S. R. R. Co., 12 N. Y. 244; Wheeler *v.* Watertown St. R'y Co., 77 Hun, 611; affirmed in 145 N. Y. 639; the majority of which cases are reported in this volume.)

In FRANCISCO *v.* TROY & LANSINGBURGH R. R. Co., 78 Hun, 13 (1894), judgment for plaintiff was reversed, in action for damages for injuries sustained while riding on the platform of a street car, as the car was rounding a curve. It appeared that there was room for the plaintiff inside the car. The rate of speed being one of the principal grounds of negligence charged, it was error to admit evidence of witness not competent to form an opinion on that point.

In McGRATH, Adm'r. *v.* BROOKLYN, QUEENS COUNTY & SUB-URBAN R. R. Co., 68 N. Y. State Rep. 444 (Supreme Court, 1895), plaintiff's son was killed while a passenger on defendant's electric car, owing to being shaken off the step of the car, by the jolting of the car. The car was crowded and the deceased was compelled to ride on the step of the car, being invited to do so by the persons in charge of the car. Judgment for plaintiff affirmed, the court holding that, under the circumstances, the deceased was not guilty of contributory negligence in riding on the step of the car.

In MURPHY *v.* NINTH AVENUE R. R. Co., 58 N. Y. State Rep. 140 (N. Y. Superior Court, 1893), judgment for plaintiff was reversed in action for damages for injuries sustained by passenger, who, on boarding open street car on the easterly side, crossed over to the westerly side of the car, and, while so doing, he collided with an elevated railroad column and was knocked off the car. There was no claim as to sudden jolt or jar of the car. Held, defendant not liable. Affirmed 149 N. Y. 609.

The case of VROMAN *v.* HOUSTON, WEST STREET & PAVONIA FERRY R. R. Co., 7 Misc. Rep. 234 (N. Y. City Court, 1894), resembles the Murphy case (*supra*), and was decided by the rule governing that case. Plaintiff was passing along the side step of an open summer car, when his head came in contact with an elevated railroad column and was badly injured. Judgment of nonsuit affirmed. (Affirmed in 7 Misc. Rep. 745.)

In NORRIS *v.* BROOKLYN CITY R. R. Co., 4 Misc. Rep. 294 (Brooklyn City Court, 1893), judgment for plaintiff was affirmed in action for damages for injuries sustained by reason of the breaking of the rear platform of defendant's street car on which plaintiff was riding, the car being overcrowded, plaintiff being thrown to the ground. (Affirmed in 143 N. Y. 666.)

In LITTMAN *v.* DRY DOCK, EAST BROADWAY & BATTERY R. R. Co., 55 N. Y. State Rep. 514 (N. Y. City Court, 1893), judgment of nonsuit was affirmed, where plaintiff while riding on the step platform of an open summer car, was struck by a truck standing in the street. It was shown that plaintiff saw the truck before boarding the car, but it was not seen by driver or conductor. Held, that plaintiff was careless in not avoiding the danger.

For other cases relating to Persons injured on Platforms of Trains, etc., see the cases in Note of New York cases on Persons on Cars Struck by Falling Objects, or Obstructions on Tracks, page 663, *post*.

PIPER V. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Supreme Court, New York, Second Department, February Term, 1894.

[Reported in 76 Hun, 44.]

FALLING FROM REAR DOOR OF SLEEPING CAR—ERRO-NEOUS NONSUIT.—Where plaintiff was awakened by the porter of a sleeping car as defendant's train was approaching the city, and in going to the washroom, which was dark, he felt for the door of the closet, and grasping a knob of a door, which proved to be the rear door of the car, he fell through the door from the train and was injured, the question of negligence should have been submitted to the jury, and it was error to nonsuit.

APPEAL by plaintiff Elwin S. Piper, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the County of Kings, on the 28th day of June, 1893, dismissing the plaintiff's complaint, and for costs, upon the verdict of a jury rendered by direction of the court after a trial at the Kings County Circuit, and also from an order made on the 22nd day of June, 1893, and entered in said clerk's office denying the plaintiff's motion for a new trial made upon the minutes. *Judgment reversed.*

JOS. A. BURR, JR., for appellant.

THORNDIKE SAUNDERS and EDWIN D. WORCESTER, JR., for respondent.

Cullen, J. — This is an appeal from a judgment for the defendant upon a verdict at circuit directed by the court.

The plaintiff, on an evening in January, took a sleeping car at Albany, bound for New York, where the train was to arrive at 6:30 in the morning. His testimony was to the effect that on the approach of the train to the city, about six o'clock, he was awakened by the porter; that, partially dressed, he started for the washroom, which he found wholly dark; that, to comply with a call of nature, he felt for the water-closet, the location of which he knew, having been there the night before; that he grasped for the knob, and found one which he supposed to be that of the closet, but which proved to have been that of the rear door of the car, which had been left open, and that he was immediately precipitated through it from the train upon the ground, and was seriously injured.

That the plaintiff fell from the car was not disputed, but the absence of light, and that the door was open, were disputed. There was no such conclusiveness of the evidence in favor of the defendant as justified a direction in its favor on the disputed questions of fact. It is, therefore, to be determined whether, in the most favorable aspect of the evidence, the plaintiff failed, as a matter of law, to show any liability on the part of the defendant.

The plaintiff, being a passenger on the sleeping car, had the right to expect those conveniences which are furnished by such cars, and for which he had paid. *Carpenter v. N. Y., N. H. & H. R. R. R. Co.*, 124 N. Y. 58. It is a matter of common knowledge that on such cars passengers are expected to use the conveniences of the car during the night, and also are awakened in time that they may both dress and make their toilets before arriving at their destination. When the plaintiff reached the toilet room he found it dark. He had a call of nature which it was reasonable for him to discharge, provided he did not place himself in danger. We think that it cannot be said, as a matter of law, that the plaintiff, upon discovering the darkness of the toilet room, should have returned to the body of the car, found the porter, and waited until the room was lighted. The question of contributory negligence, therefore, was for the jury.

The defendant's negligence was also for the jury. We think no negligence can be predicated on the character of the car itself. But the absence of light might be found to be negligence, for the duty of the defendant was not only to light the lamps, but also to use reasonable diligence to maintain the light in the toilet room. Negligence might also be predicated from the door being left open. The rules of the company provided that it should be kept closed between the stations. As this was the last car of the train, it was not necessary to open the door for communication between different cars. It is not entirely clear how this door was required by the rules to be fastened, and it may appear on another trial that it might have been opened by a passenger for any purpose, such as air or to go out on the platform. But, we think, in any aspect of the case, the question of negligence based on the absence of light, should have been submitted to the jury.

The judgment should be reversed and a new trial ordered, costs to abide event.

DYKMAN and PRATT, J.J., concurred.

**DALE v. DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY.**

Court of Appeals, New York, March, 1878.

[Reported in 73 N. Y. 468.]

PASSENGER'S ARM ON WINDOW SILL STRUCK BY OBJECT WHILE TRAIN WAS CROSSING BRIDGE—CONSTRUCTION OF BRIDGE—ERRONEOUS EVIDENCE.—In an action to recover damages for injuries sustained by plaintiff, whose arm, while resting on the window sill of a car, was struck by some substance as defendant's train was passing over a bridge, it was error to admit testimony as to improvements on new bridge some months after the accident, to show negligence in allowing old bridge to remain.

APPEAL from judgment of the General Term of the Supreme Court in the First Judicial Department, affirming a judgment in favor of plaintiff, entered upon a verdict. The facts are stated in the opinion. *Judgment reversed.*

HAMILTON COLE, for appellant.

HORACE E. SMITH, for respondent.

Rapallo, J. — The grounds upon which negligence was claimed to be imputable to the defendant were, that the bridge was too narrow for the safe passage of the car in which the plaintiff was riding, and that the bridge was out of repair, some of the boards on the side being loose and warped, and liable to project; and it was urged on the trial that the injury to the plaintiff's arm was attributable to these defects in the bridge. All these positions were controverted by the defendant. It claimed that the side of the car not having come in contact with any part of the bridge, the plaintiff's elbow could not have been hit, unless it projected out of the window, beyond the side of the car, and that it was negligent on his part to occupy the window with his arm, or to allow any part of his arm to project out of it. It appeared in evidence that the bridge in question was constructed of wood. It was a truss bridge, the inside of the truss work being covered with a sheeting of boards. The distance between the outside of the window sill of the car and the inside of the truss work on the side on which plaintiff was sitting was seven inches. The bridge had been in use a number of years before the accident, about fifty passenger trains crossing it daily. The accident took place in August, 1871. In the following

year the wooden bridge was taken down and a new one of iron placed upon the same foundation. The trusses of the new bridge did not rise as high as the window sill. Testimony was received, under objection, to the effect that on the new bridge the distance between the rails and the sides of the trusses was greater than on the old one; but it appeared that this difference arose from the fact that the new trusses being of iron occupied less space than the wooden ones. The judge, at the trial, submitted to the jury the question, among others, whether the old bridge was too narrow for the cars used upon it; and he specially called their attention to the fact that it appeared that some few months after the accident a new iron bridge was built and placed upon the same foundation as the old bridge, but that it was wider, because of the material being iron instead of wood, and he charged the jury: "You may take that fact into consideration in determining whether the defendants were not guilty of negligence in allowing the old bridge to remain."

We think that this was error. The change in the bridge, from wood to iron, was made a considerable time after the accident, and there was no circumstance or evidence connecting it in any way with that occurrence, or tending to show that it was other than an ordinary betterment of the road. The circumstance that the change of material left more space between the sides of the trusses and the track was too remote, we think, to have afforded legitimate ground for an inference by the jury that the change was made for the purpose of obtaining that increase of space, or that it was a concession on the part of the defendant that the old bridge was too narrow for safety. It was a mere incident of the change of material. Furthermore, the increased space was of no importance as bearing upon the safety of passengers, when resting their arms upon the window sills, for in the new bridge the trusses were not as high as the sills. The case is not analogous to those in which evidence had been admitted of the repairing of a road immediately after an accident. In such a case the making of the repairs may be regarded as some evidence that they were needed, and consequently that the road was out of repair. But this was not a case of repairs. It was a change in the material and construction of the bridge, made long after the accident, and an improvement which may have been induced by considerations having no reference whatever to the safety of the arms of passengers. There was a great deal of testimony as to the old bridge being in safe condition at the time of the accident, and from the prominence given in the charge to the fact of its subsequent replacement by an iron bridge, that circumstance may have been

the turning point in the mind of the jury. We think that this change bore too remotely, if at all, upon the question, to justify its submission to the jury as a ground for finding negligence in using the old bridge, and that upon this exception a new trial should be granted. As the other exceptions may not arise upon a new trial, it is not necessary now to pass upon them.

The judgment should be reversed and a new trial granted, costs to abide the event.

HALLAHAN v. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

Court of Appeals, April, 1886.

[Reported in 102 N. Y. 194.]

PASSENGER'S ELBOW ON WINDOW SILL STRUCK BY MAIL CRANE AS TRAIN WAS PASSING THROUGH STATION—*RES GESTÆ*—Where a passenger was sitting by an open window of a car with his elbow on the window sill, and as the train was passing the station it took the mail from a crane placed near the track, and the arm of the crane struck plaintiff's elbow, evidence as to confusion produced among other passengers by a rattling noise outside the car at the time of the accident was admissible as part of the *res gesta*.

APPEAL by defendant from judgment of General Term, Supreme Court, Second Judicial Department. The facts appear in the opinion. *Judgment affirmed.*

LEWIS E. CARR, for appellant.

D. F. GEDNEY, for respondent.

Miller, J. — The only questions presented upon this appeal relate to the rulings of the judge in regard to the evidence.

It is insisted by the appellant's counsel that certain testimony of one of the witnesses for the respondent, Daniel Creegan, was incompetent and improper, and that the court erred in refusing to strike out the same. The questions put to the witness were not objectionable, but it is urged that the answers were improper and should have been stricken out, in accordance with the motion made by the appellant's counsel.

The following was one of the questions put to the witness and the answer given: "Q. Just describe the position of his right elbow in reference to that window of the car? A. Mr. Hallahan sat straight up in the seat at the window, and his elbow was resting

on the sill, and I should judge that it could not project out of the window by the position that he held it in the car."

Defendant's counsel objected to the latter part of the answer, commencing at "and I should judge," etc., and moved to strike it out, on the ground that it was a conclusion and not a statement of fact, which motion was denied, and defendant excepted. The witness was also asked: "Q. Was or was not his elbow, at the time this object struck the car, inside or outside the car window?" to which he answered: "It could not be outside the car window; it was probably on a level with the outside of the car; my opinion was from the position that it was inside." Counsel for the defendant objected to this answer, and moved to strike it out, on the ground that it was the opinion of the witness and not a statement of fact, and the motion was granted as to the part "my opinion," etc. Defendant's counsel excepted to the refusal to strike out the remainder of the answer.

The objection to the first answer was upon the ground that it gave witness's opinion as to the position of the plaintiff's elbow, which would have been inadmissible if it had been asked for by a question put for that purpose. The witness had described the position of the plaintiff's arm, and his expression "I should judge" was qualified by what he had previously stated and by what he stated afterward. It was a simple statement of the facts as they actually existed, with the qualification that in the position his arm was, it could not project out of the car window. It was merely a careful statement of the facts without a positive allegation as to its accuracy, and not in the nature of an opinion alone. It may be regarded as the statement of a witness who is extremely cautious in giving evidence. The expression used and others of a similar character, such as "I think," when the facts are presented, cannot always be regarded as a mere opinion. Cases frequently arise where witnesses are called upon to state the appearance of a person at a particular time, when a question arises as to the soundness of his mind, and when the facts are stated, the witness can properly be allowed to testify as to such appearance in a manner which to some extent involves the judgment of the witness.

Within this rule we think the answer given to the first question was not objectionable. But even if the evidence may be regarded as calling for an opinion in any way, as the testimony was based upon the personal knowledge of the facts, we think it may be considered as competent. *Blake v. People*, 73 N. Y. 586.

The cases relied upon by the appellant's counsel are not adverse

to the rule laid down. The remarks we have made will apply to the answer given to the second question. The objectionable part of that answer was stricken out, and what remained was proper testimony based upon the fact previously stated that the witness saw the position of plaintiff's elbow.

Another witness on the trial testified that he was sitting in about the middle of the car on the right hand side, and at this point there was a rattling noise which appeared to be on the same side; that the people looked around, apparently wondering what the trouble was; that he noticed a commotion in the forward part of the car; that he went there and saw plaintiff was hurt. He was then asked, "Did you notice any confusion produced among the passengers by the noise on the outside of the car?"

This question was objected to on the ground that it was immaterial and improper. Objection overruled and an exception taken.

We think the plaintiff had a right to prove all the circumstances attending the accident as a part of the *res gestæ* and to show that others in the car heard the noise of the collision of the crane with the car, the confusion being the result of the collision, and showing the nature thereof. Similar testimony was given by other witnesses without objection. The evidence was, we think, admissible.

We are not at liberty to review the questions of fact presented by the evidence upon the trial, and the verdict of the jury is conclusive in regard to them.

The judgment should be affirmed.

**NOTE OF NEW YORK CASES RELATING TO PERSONS ON CARS
STRUCK BY FALLING OBJECTS OR OBSTRUCTIONS ON TRACK.**

Among other cases relating to Persons Injured on Trains and Street Cars are the following:

Passenger's Arm Resting on Window Sill:

IN *HOLBROOK v. UTICA & SCHENECTADY R. R. Co.*, 12 N. Y. 236 (1855), judgment for plaintiff was affirmed, where she was injured by something striking her arm as she was resting same on window sill of defendant's train. On the question of negligence, RUGGLES, J., in delivering the opinion of the court, approved of a charge which was to the effect that the jury "must be satisfied from the proofs, not from speculation, that the defendant's negligence alone caused the injury; that if the negligence or want of care of the plaintiff contributed at all to the result, she could not recover; that the company only contracted to carry her safely when she kept within the cars; that it was for the jury to say whether her elbow was out of the cars at the time of the injury, and, if it was, it was a

circumstance or fact from which they might infer negligence or want of ordinary care on her part." (Affirming 16 Barb. 113.)

In **BREEN v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.**, 109 N. Y. 297 (1888), judgment for plaintiff was affirmed, where injury was caused by being struck by something as freight car passed the passenger train, plaintiff's arm at the time resting on the window sill of open window of car.

See also **VOORHEES v. KINGS COUNTY ELEVATED R. Co.**, 21 N. Y. Supp. 775 (fingers injured by fall of car window).

Iron Bar Crashing into Smoking Car :

WALKER v. ERIE RAILWAY Co., 63 Barb. 260 (1872), was an action for damages for injuries sustained by a passenger who was struck by an iron bar projecting five or six feet from a construction train, which crashed into defendant's passenger train, seriously injuring plaintiff who was in the smoking car. Judgment for plaintiff for \$20,000, affirmed.

Fall of Clothes-Wringer from Rack :

In **MORRIS v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.**, 106 N. Y. 678 (1887), judgment for plaintiff was reversed in action for damages for injuries sustained by the fall of a clothes-wringer, place by another passenger in rack over his seat, it being held that railroad was not liable, not being bound to remove packages placed in racks by passengers.

Broken Glass :

In **ALBERTI v. NEW YORK, LAKE ERIE & WESTERN R'y Co.**, 118 N. Y. 77 (1889), where plaintiff, while on defendant's train, was struck by broken glass, sustaining severe injuries resulting in broken ribs, loss of use of legs, and concussion of spine, judgment for \$25,000 was affirmed.

Struck by Bell Rope :

In **PALMER v. PRESIDENT, ETC., DELAWARE and HUDSON CANAL Co.**, 120 N. Y. 170 (1890), judgment for plaintiff for \$5,000 affirmed. It appeared that plaintiff, while a passenger on defendant's train was struck in the eye by the end of the bell rope which was attached to the engine, the engine having broken loose from the train, due to defective appliance. The question whether defendant had exercised due care in its inspection of the appliances was properly left to the jury.

Pieces of Iron Falling Through Roof of Car :

In **BIRMINGHAM v. ROCHESTER CITY and BRIGHTON R. R. Co.**, 137 N. Y. 13 (1893), judgment for plaintiff for \$3,500 was reversed. It appeared that as defendant's street car was passing over a canal bridge, a part of the public highway, an iron stirrup of the bridge gave way, and some pieces of iron fell through the roof of the car and injured plaintiff. The court held that the railroad

company was not answerable for defective highway, where it had no knowledge or notice of the defect. (Reversing 18 N. Y. Supp. 649.)

Car Load of Stone Crashing into Train:

In *LYNCH v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 8 App. Div. 458 (1896), judgment for defendant was reversed, where plaintiff was injured by a car load of stone being thrown against the defendant's train on which she was a passenger, said car load of stone being operated from a quarry upon a side hill above the railroad, it being held that defendant was bound to exercise the greatest diligence to keep its tracks clear from obstructions. In this case it was shown that employees of defendant had had notice of previous loss of control of such cars and their crashing upon the track, such notice being held to be notice to defendant.

Struck by Wagon Pole:

In *HILL v. NINTH AVENUE R. R. Co.*, 109 N. Y. 239 (1888), judgment of nonsuit was reversed, where plaintiff, while riding in defendant's street car, was struck by pole of truck which crashed into car, the car being driven at rapid rate. Held, that the facts raised a presumption of negligence on part of driver in management of car.

Street Car Colliding with Wagon:

In *SEIDLINGER v. BROOKLYN CITY R. R. Co.*, 28 Hun, 503 (1882), it appeared that a coal cart was backed up to the sidewalk, the rear of the cart being near the track, when one of defendant's open electric cars came along, and, without stopping, attempted to pass, when the horse of the coal cart backed, and the cart struck the car and plaintiff was injured. Judgment for plaintiff affirmed, the question of negligence of defendant being for the jury to determine.

O'MALLEY v. METROPOLITAN STREET R'y Co., 3 App. Div. 259 (1896), was an action to recover damages for injuries to plaintiff, caused by negligence of defendant's street car driver in driving the car on while a loaded wagon was turning off into a cross street, resulting in some projecting boards on the wagon crashing into the street car, breaking a window and injuring plaintiff. Judgment for plaintiff affirmed. (Following the Seidlinger case, 28 Hun, 503, in the preceding paragraph.)

In *WOOD v. BROOKLYN CITY R. R. Co.*, 5 App. Div. 492 (1896), it appeared that plaintiff was riding on the side step or platform of one of defendant's electric cars, the car being crowded, when he was struck by the tailboard of a standing truck and knocked off the platform. Held, negligence on part of motorman to try to run his car past the truck, the horses of which were being watered, the close proximity of truck to track being sufficient to warn him of liability of collision. Judgment for plaintiff affirmed. (Following the O'Malley and Seidlinger cases, *supra*.)

See also, *DEVLIN v. ATLANTIC AVE. R. R. Co.*, 10 N. Y. Supp. 848 (collision of open horse car with wagon); *WALKER v. ATLANTIC AVE. R. R. Co.*, 11 N. Y. Supp. 742 (kicked by horse while riding on open horse car).

Clothing Caught on Curtain Hook on Car:

In *KELLY v. NEW YORK & SEA BEACH R. R. Co.*, 109 N. Y. 44, judgment for plaintiff for \$1,000 damages for injury to wrist caused by clothing catching on broken curtain hook of open steam car, was reversed on the ground that the fact that the hook was allowed to remain in such position was not so dangerous as to constitute evidence of negligence.

For other actions as to Persons Struck by Objects on Track, see note of New York cases relating to Accidents on Platforms, page 654, *ante*.

For actions relating to the topics covered in this volume, subsequent to 1896, see Vols. 1-5, Am. Neg. Rep. and the current numbers of that series of Reports. All Negligence cases decided in the several State and Federal Courts, from 1897 to date, appear in the current series of American Negligence Reports.

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- where boy, while driving horse at request of driver, was injured by being jostled by boys who were getting off platform of car, and he fell from car, an allegation that platform was not safe place, and it was negligence to place plaintiff upon it, was not sustained, and verdict for plaintiff properly set aside. . . . N. Y. 639
 - statute relating to passengers on platforms of train does not apply to street railroads. . . . N. Y. 644
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- passenger injured, the defendant knowing of the practice of mail bags being thrown from train, a cause of action was established against defendant, and judgment of nonsuit reversed. N. Y. 593
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- where evidence is given at trial at variance with the complaint, and it is not objected to at the time, error is waived. Cal. 66
- where declaration showed that injury was not caused by negligence, but was purely accidental, not error to dismiss action. Ga. 193
- in action against several stage proprietors plaintiff need not prove that all defendants were joint owners of stage line. Ill. 200
- an answer which alleged that the injury to plaintiff was "the result of his own carelessness in being in an improper and dangerous place" failed to show that the injury was caused by fault of plaintiff in being in dangerous place on train. Ind. 270
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- where passenger was injured by upset of stage coach and the case was tried upon the theory that it made no difference whether plaintiff was a passenger or a trespasser in regard to defendants' liability, it was error to strike out portion of defendants' answer.....Mont. 538
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where passenger on hurricane deck of steamboat was struck by hawser as vessel was being brought to landing, the presumption of negligence was for defendant to rebut. N. Y. 578

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- where person on way to board train fell into hole on defendant's tracks, which track was in use by another railroad from whom plaintiff purchased ticket, defendant held not liable, not being bound to keep in repair

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- railroad company liable for failure to provide accommodations at station, whereby plaintiff contracted a cold from exposure to weather. N. H. 555
- passenger falling over foot of baggage master, who was attending to his duties on station platform; railroad not liable. N. H. 556
- where a piece of timber projected over a station platform from a car passing through station and a woman, in order to avoid being struck by it, was obliged to throw herself on the platform, the railroad company was liable for the sickness caused by shock to plaintiff's nervous system, the result being due to its carelessness. N. J. 574
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- where passenger was injured at station, testimony of two witnesses that they considered platform dangerous was merely expression of opinion and not

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- where mail bag was thrown from
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- note of New York cases relating
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- where company was empowered to
 make railway and charge passen-
 gers for conveyance, and there
 was a provision that no action
 for anything done or omitted
 to be done, under the act, could
 be brought without twenty days'
 notice in writing, and plaintiff
 brought action for injury sus-
 tained while a passenger, no
 notice was necessary, as action
 was brought against company
 as carriers, and not for anything
 under the act. Eng. rule, 323
- in statutory action for damages
 for death of party, recovery is
 to be of a pecuniary compensa-
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- note of Massachusetts cases relating to standing on steps of open street cars.....Mass. 447
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- a shipper of stock, riding upon free pass, assumes the risks and inconveniences while caring for stock in transit, and modified accordingly, the liability of railroad to shipper for injuries sustained by negligence of employees is that of a common carrier for hire. Neb. 550, 551
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- where plaintiff, while standing on front platform of street car, was thrown off by sudden start of car, and it was proved that driver was negligent in starting up horses, and there was no evidence of negligence on plaintiff's part, nonsuit properly refused. N. J. 559
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- carrier liable for derailment of train caused by careless switching by servants of connecting road. Mass. 451
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- TICKET.** See also **FREE PASS.**
- person using ticket issued to another, injured on train, carrier not liable. Iowa, 329
- where person used non-transferable ticket issued to another and was injured on train, carrier liable only for gross negligence, such person being a trespasser traveling on free pass issued to another person. Iowa, 329

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- person standing upon station platform injured by torpedo explosion, railroad company not liable. N. Y. 604

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- husband entitled to recover damages for inconvenience in being compelled to walk home on account of being on wrong train, but illness of wife too remote from breach of contract to recover damages therefor. Eng. rule, 135
- where action founded on breach of duty, and declaration founded on misfeasance, of stage coach proprietors, verdict and judgment for plaintiff not erroneous. Eng. rule, 206
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- passenger injured in derailment of train; death from pneumonia; proximate cause..... Ala. 5
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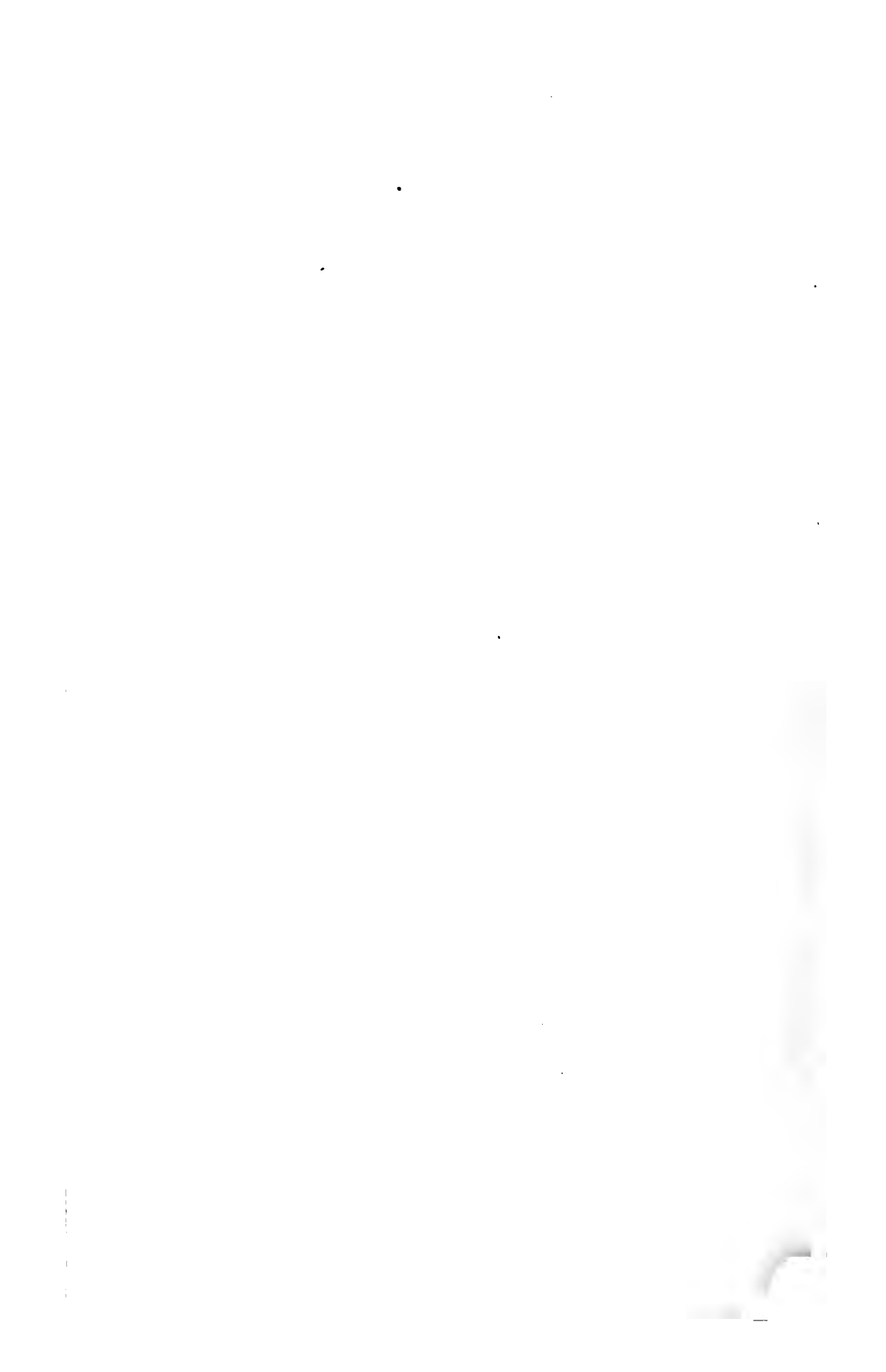
WITNESS.

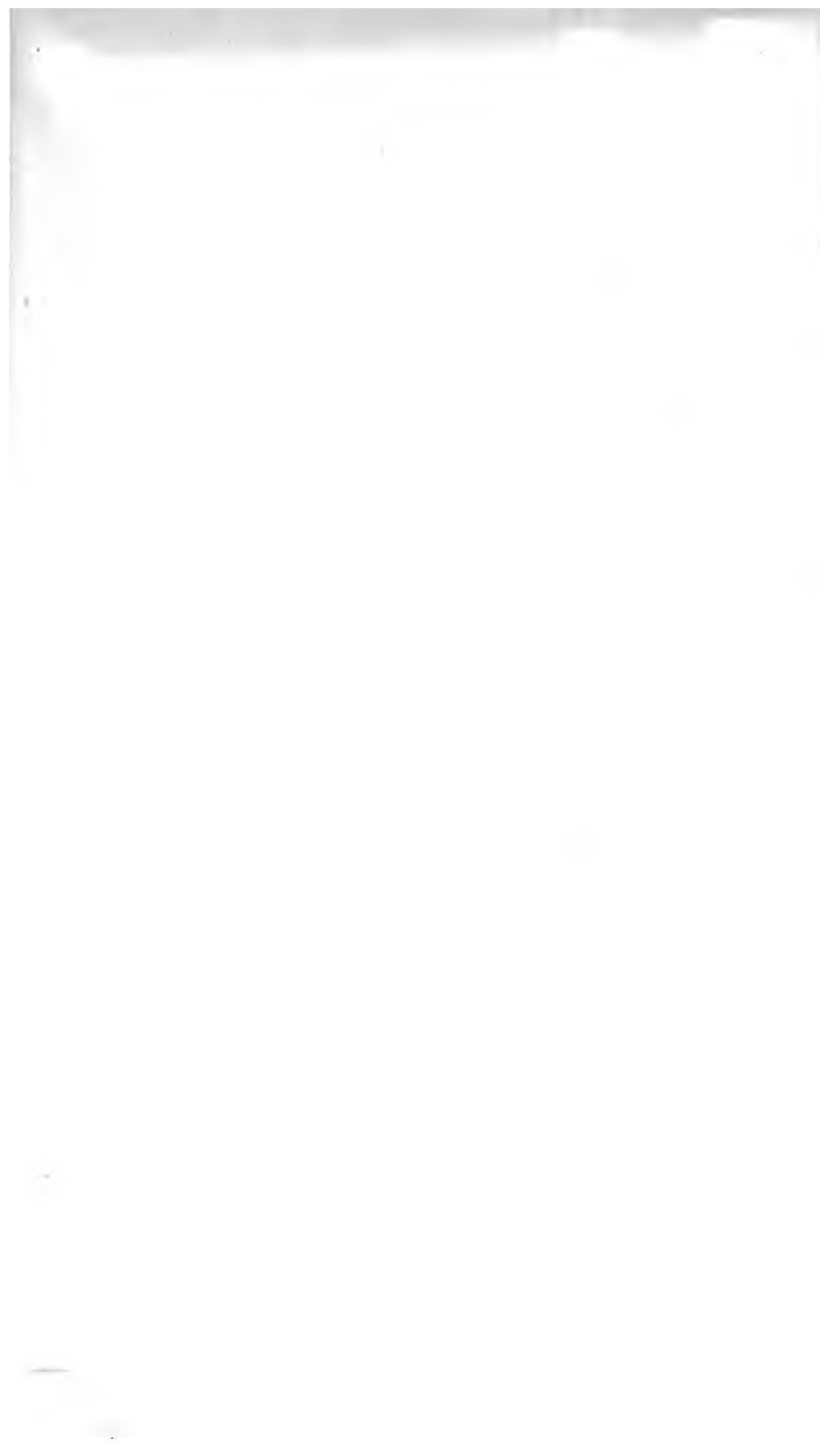
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